UNITED STATES DISTR NORTHERN DISTRIC	D
DOLPHIN MANUFACTURING COMPANY, INC., an Oklahoma corporation,	MAY 3 1 2000 Phil Lombardi, Clerk U.S. DISTRICT COURT
Plaintiff,	
vs.) Case No. 99-CV-194 E (EA)
MOVIES & GAMES 4 SALE, L.P., a Delaware limited partnership, GAMES TRADER, INC., a Canadian corporation, and COMERICA)))
BANK-TEXAS,	ENTERED ON DOCKET
Defendants	CONTRACTOR OF THE MAY 3 1 2000

ORDER OF DISMISSAL WITHOUT PREJUDICE

Pursuant to stipulation by Plaintiff, Dolphin Manufacturing Company, Inc. ("Dolphin"), and Defendant/Intervenor, Comerica Bank-Texas ("Comerica"), the Court hereby orders the dismissal without prejudice of Dolphin's claims against Comerica in the above-styled action. This dismissal shall in no way affect any rights Dolphin may have to appeal the Court's earlier ruling quashing Dolphin's garnishment proceedings.

IT IS SO ORDERED this 30" day of May

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	MAY	31	2000	

WILLIAM E. BENSLEY,		Phil Lombardi, Clerk U.S. DISTRICT COURT
vs.	Petitioner,	No. 98-CV-027 B (J)
TWYLA SNIDER, Warden,	Respondent.	ENTERED ON DOCKET MAY 3 1 2000 DATE

ORDER

Before the Court for consideration is the petition for a writ of habeas corpus filed by Petitioner, a state inmate appearing *pro se*. Respondent has filed a response pursuant to Rule 5, Rules Governing Section 2254 Cases (Docket #4). Petitioner has filed a reply to Respondent's response (#6). For the reasons discussed below, the Court finds the petition should be denied.

BACKGROUND

Petitioner attacks his conviction entered in Craig County District Court, Case No. CF-95-99.

A jury found Petitioner guilty of Possession of an Intoxicating Beverage in Jail, After Former Conviction of Two or More Felonies, for which he received a sentence of twenty (20) years imprisonment. Petitioner's sentence was ordered to be served consecutively to sentences entered in Craig County District Court, Case Nos. CRF-93-53 and CRF-93-61.

Petitioner appealed his conviction to the Oklahoma Court of Criminal Appeals ("OCCA").

On direct appeal, Petitioner raised the following propositions of error:

Proposition I:

The State's evidence was insufficient to prove beyond a reasonable

doubt that the substance found in Mr. Bensley's cell was intoxicating.

Proposition II:

Ineffective assistance of counsel denied Mr. Bensley a fair trial.



Proposition III: Prosecutorial misconduct denied Mr. Bensley a fair trial.

(#4, Ex. C). On March 19, 1997, the OCCA entered its unpublished summary opinion affirming Petitioner's conviction and sentence. (#4, Ex. B). Thereafter, Petitioner filed an application for post-conviction relief in the state trial court. See attachments to petition. The requested relief was denied on May 21, 1997 and Petitioner failed to file a post-conviction appeal in the OCCA.

Petitioner filed the instant petition for writ of habeas corpus on January 12, 1998. He raises the same three grounds of error raised on direct appeal. In response, Respondent argues that Petitioner is not entitled to habeas corpus relief based on the standard imposed by 28 U.S.C. § 2254(d), as amended by the Antiterrorism and Effective Death Penalty Act ("AEDPA").

ANALYSIS

A. Exhaustion

As an initial matter, the Court must determine whether Petitioner meets the exhaustion requirements of 28 U.S.C. § 2254(b); see also Rose v. Lundy, 455 U.S. 509, 510 (1982). Respondent concedes and the Court finds that Petitioner has exhausted his state remedies by presenting his claims to the OCCA on direct appeal. Therefore, the Court finds that Petitioner meets the exhaustion requirements under the law.

B. Evidentiary hearing

The Court finds that an evidentiary hearing is not necessary as Petitioner has not met his burden of proving entitlement to an evidentiary hearing. See Miller v. Champion, 161 F.3d 1249 (10th Cir. 1998). On direct appeal, the OCCA denied Petitioner's request for an evidentiary hearing based on his ineffective assistance of counsel claim. See #4, Ex. B at n.1. Because Petitioner was

denied an evidentiary hearing in state court, he shall not be deemed to have "failed to develop the factual basis of a claim in state court." Miller, 161 F.3d at 1253. Therefore, his request for an evidentiary hearing is governed by standards in effect prior to enactment of the Antiterrorism and Effective Death Penalty Act ("AEDPA") rather than by 28 U.S.C. § 2254(e)(2), as amended by the AEDPA. Id. Under pre-AEDPA standards, in order to be entitled to an evidentiary hearing, a petitioner must make allegations which, if proven true and "not contravened by the existing factual record, would entitle him to habeas relief." Id. Petitioner's claims in this case are contravened by the record. As a result, Petitioner is not entitled to an evidentiary hearing.

C. 28 U.S.C. § 2254(d) Standard

The AEDPA, enacted April 24, 1996, amended the standard to be applied by federal courts reviewing constitutional claims brought by prisoners challenging state convictions. Pursuant to § 2254(d),

An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –

- (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
- (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d). In Williams v. Taylor, --- U.S. ---, 120 S.Ct. 1495, 1523 (2000) (O'Connor, J., concurring), the Supreme Court provided guidance in applying § 2254(d) as follows:

... § 2254(d)(1) places a new constraint on the power of a federal habeas court to grant a state prisoner's application for a writ of habeas corpus with respect to claims adjudicated on the merits in state court. Under § 2254(d)(1), the writ may issue only if one of the following two conditions is satisfied -- the state-court adjudication

resulted in a decision that (1) "was contrary to . . . clearly established Federal law, as determined by the Supreme Court of the United States," or (2) "involved an unreasonable application of . . . clearly established Federal law, as determined by the Supreme Court of the United States." Under the "contrary to" clause, a federal habeas court may grant the writ if the state court arrives at a conclusion opposite to that reached by this Court on a question of law or if the state court decides a case differently than this Court has on a set of materially indistinguishable facts. Under the "unreasonable application" clause, a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from this Court's decisions but unreasonably applies that principle to the facts of the prisoner's case.

In the instant case, each of Petitioner's claims was considered on the merits and rejected by the Oklahoma Court of Criminal Appeals on direct appeal. Therefore, § 2254(d) guides this Court's analysis of those claims. For the reasons discussed below, the Court finds that each claim should be denied.

D. Petitioner's claims

1. Challenge to the sufficiency of the evidence

As his first proposition of error, Petitioner asserts that the State's evidence was insufficient to prove beyond a reasonable doubt that the substance found in his cell was intoxicating. As stated above, Petitioner raised his challenge to the sufficiency of the evidence on direct appeal. After considering the merits of the claim, the Oklahoma Court of Criminal Appeals rejected the challenge and affirmed Petitioner's conviction. Thus, the § 2254(d) standard of review governs this Court's review of Petitioner's claim.

After careful review of the record in this case, including the trial transcript, the Court finds

Petitioner has failed to demonstrate that the decision of the Oklahoma Court of Criminal Appeals

was contrary to clearly established federal law as set forth by the Supreme Court or that there was

an unreasonable application of Supreme Court law to the facts of this case. Sufficiency of the

evidence claims are evaluated based on the following standard established by the Supreme Court:

. . . the critical inquiry on review of the sufficiency of the evidence to support a criminal conviction must be not simply to determine whether the jury was properly instructed, but to determine whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt. But this inquiry does not require a court to 'ask itself whether it believes that the evidence at the trial established guilt beyond a reasonable doubt.' Instead, the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. This familiar standard gives full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts. Once a defendant has been found guilty of the crime charged, the factfinder's role as weigher of the evidence is preserved through a legal conclusion that upon judicial review all of the evidence is to be considered in the light most favorable to the prosecution.

Jackson v. Virginia, 443 U.S. 307, 318-19 (1979) (citations omitted). Although the Oklahoma Court of Criminal Appeals did not provide a detailed analysis of Petitioner's claims, the summary opinion does state that "[a]fter thorough consideration of the entire record before us on appeal, including the original record, transcripts, and briefs of the parties, we affirm." The Oklahoma Court of Criminal Appeals applies the Jackson standard in evaluating challenges to the sufficiency of the evidence. See, e.g., Davis v. State, 916 P.2d 251 (Okla. Crim. App. 1996); Brown v. State, 871 P.2d 56 (Okla. Crim. App. 1994); Allen v. State, 862 P.2d 487 (Okla. Crim. App. 1993). Under § 2254(d), Petitioner must demonstrate that in rejecting his challenge to the sufficiency of the evidence, the Oklahoma Court of Criminal Appeals decision was an unreasonable application of Jackson or that the decision was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

In evaluating the evidence presented at trial, the Court does not weigh conflicting evidence or consider witness credibility. Wingfield v. Massie, 122 F.3d 1329, 1332 (10th Cir. 1997); Messer

v. Roberts, 74 F.3d 1009, 1013 (10th Cir. 1996). Instead, the Court must view the evidence in the "light most favorable to the prosecution," <u>Jackson</u>, 443 U.S. at 319, and "accept the jury's resolution of the evidence as long as it is within the bounds of reason." <u>Grubbs v. Hannigan</u>, 982 F.2d 1483, 1487 (10th Cir. 1993).

Although Petitioner admits that the substance found in his cell was tested and proved to contain alcohol, he claims that "no fact has been submitted that the substance was ever in Mr. Bensley's possession. Just by Mr. Bensley occupying a bunk where the substance was found, do not establish facts that he was the preson (sic) that made the home-brew; and being housed in an open cell where number of other prisoner's (sic) housed at the same time, is evidence that any of the prisoner's (sic) housed therein could have made the home-brew." (#1).

Oklahoma law defines the following as essential elements of Possession of Intoxicating Beverage in Jail: (1) any person without authority (2) brings into or has in his possession, (3) in jail, (4) an intoxicating beverage or low-point beer. Okla. Stat. tit. 57, § 21 (West 1995). After carefully reviewing the trial transcript, and in the light most favorable to the prosecution, the Court finds there was sufficient evidence from which a reasonable jury could have inferred that Petitioner was guilty of possession of intoxicating beverage in jail. Petitioner does not deny that he was in custody in the Craig County Jail on June 19, 1995 when the three plastic milk jugs were confiscated from his cell. Furthermore, regardless of whether or not Petitioner was responsible for mixing the ingredients used to make the "tomato beer," he admitted that he tasted the brew and had access to it. (#4, Trans. at 254, 266). Thus, the jury could have reasonably concluded, based on Petitioner's testimony alone, that he had the brew in his possession. Lastly, the jury heard the testimony of Richard Dill, a forensic chemist with the Oklahoma State Bureau of Investigation, that the alcohol content of the

fluid found in the three plastic milk jugs ranged from 4.9 % to 7 % by weight. (#4, Trans. at 194). In addition, Wayne "Moose" Fowler, head jailer at the Craig County Jail during the relevant time period, testified that before locating the three milk jugs under Petitioner's bunk, he smelled a strong odor of alcohol in the North tank area of the jail. (#4, Trans. at 159). Fowler also testified that after confiscating the jugs and returning to the jail's office, he opened the jugs and detected a strong odor of alcohol. (#4, Trans. at 162). Based on the identified testimony, a reasonable jury could have inferred that Petitioner was guilty of possession of intoxicating beverage in jail. Under the <u>Jackson v. Virginia</u> standard, there was sufficient evidence to convict Petitioner. The Court finds that the OCCA's rejection of this claim on direct appeal was not an unreasonable application of the legal principle announced by the Supreme Court in <u>Jackson v. Virginia</u> to the facts of Petitioner's case. Thus, Petitioner has failed to satisfy the § 2254(d) standard and his petition for writ of habeas corpus should be denied.

2. Ineffective assistance of counsel

As his second proposition of error, Petitioner asserts that he was denied a fair trial due to his trial counsel's failure to subpoena witnesses to testify on his behalf. Petitioner further asserts that his trial counsel knew who the material witnesses were and that he made timely request that they be called to testify. On direct appeal before the OCCA, Petitioner argued that the performance of his trial attorneys, Ron Berry and Al Benningfield, was deficient because they failed to communicate with him and to comply promptly with his reasonable requests to call three witnesses¹ to testify on

¹Petitioner does not identify his three witnesses by name. However, it appears they were Petitioner's cellmates when the "home-brew" was confiscated. Inmate Bernard J. Sparrow would appear to have been one of the witnesses identified by Petitioner. <u>See</u> #6, attachment A, affidavit of Bernard J. Sparrow.

his behalf. Petitioner also argued that he was prejudiced by his counsel's deficient performance because without his witnesses' presence, he was forced to testify in his own defense and that, as a result, the jury learned that he had five (5) prior felony convictions, including two convictions for driving under the influence of alcohol and one for possession of marijuana.

It is well established that to prevail on an ineffective assistance of counsel, a habeas petitioner must satisfy the two-pronged standard enunciated in Strickland v. Washington, 466 U.S. 668 (1984). See Murray v. Carrier, 477 U.S. 478, 488-89 (1986); United States v. Cook, 45 F.3d 388, 394-95 (10th Cir. 1995). The Strickland test requires a showing of both deficient performance by counsel and prejudice to Petitioner as a result of the deficient performance. 466 U.S. at 687. To satisfy the deficient performance prong of the test, Petitioner must overcome a strong presumption that counsel's conduct fell within the "wide range of reasonable professional assistance [that] . . . might be considered sound trial strategy." Brecheen v. Reynolds, 41 F.3d 1343, 1365 (10th Cir. 1994) (citations omitted). "A claim of ineffective assistance must be reviewed from the perspective of counsel at the time and therefore may not be predicated on the distorting effects of hindsight." Id. (citations omitted). Finally, the focus of the first prong is "not what is prudent or appropriate, but only what is constitutionally compelled." Id. To establish the prejudice prong of the test, Petitioner must show that the allegedly deficient performance prejudiced the defense; namely, "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different." Strickland, 466 U.S. at 694. Failure to establish either prong of the Strickland standard will result in denial of relief. Id. at 696.

In the instant case, the OCCA rejected Petitioner's claim of ineffective assistance of counsel on direct appeal. The OCCA routinely applies the <u>Strickland</u> standard in evaluating claims of

ineffective assistance of counsel. See, e.g. Stemple v. State, 994 P.2d 61 (Okla. Crim. App. 2000); Romano v. State, 942 P.2d 222 (Okla. Crim. App. 1997); Walker v. State, 933 P.2d 327 (Okla. Crim. App. 1997). Therefore, this Court may grant habeas relief only if Petitioner satisfies the § 2254(d) standard, i.e., only if Petitioner demonstrates that the OCCA's resolution of the claim was an unreasonable application of Strickland to the facts of Petitioner's case. 28 U.S.C. § 2254(d); Williams v. Taylor, --- U.S. ---, 120 S.Ct. 1495, 1523 (2000) (J. O'Connor, concurring). After reviewing the record in this case, the Court finds Petitioner has failed to make the requisite showing. Without addressing the performance prong of the Strickland standard, the Court finds that Petitioner has not shown that he was prejudiced by his attorneys' allegedly deficient performance. Based on the Affidavit of Bernard J. Sparrow, provided by Petitioner as an attachment to his reply to Respondent's response (#6, attachment A), Petitioner may have anticipated his witnesses to testify that inmate Kenny Hensley, not Petitioner, was responsible for preparation of the brew.² However, the jury was not required to find that Petitioner was responsible for preparing the brew in order to find him guilty of the crime charged, Possession of Intoxicating Beverage in Jail. In addition, inmate Sparrow's affidavit confirms Petitioner's own testimony that Petitioner drank some of the brew. The Court is convinced that there is not a reasonable probability that the absence of Petitioner's witnesses affected the outcome of his trial. As a result, he has failed to satisfy the prejudice prong of the Strickland standard. The Court finds that the OCCA's rejection of this claim on direct appeal was not an unreasonable application of the legal principle announced by the Supreme Court in Strickland v. Washington to the facts of Petitioner's case. Petitioner has failed to satisfy the § 2254(d) standard

²The Court notes that inmate Sparrow's Affidavit was before the OCCA during Petitioner's direct appeal. <u>See</u> #4, Ex. B.

and habeas corpus relief on his ineffective assistance of counsel claim should be denied.

3. Prosecutorial misconduct

As his third proposition of error, Petitioner alleges that he was denied a fair trial by the prosecutor's misconduct. Specifically, Petitioner asserts that the prosecutor conveyed to the jury his personal opinion that Petitioner was guilty and should have pled guilty. He claims that during cross-examination, the prosecutor injected inadmissible evidence of plea negotiations and of Petitioner's desire to appeal.³ Petitioner raised this claim in his state direct appeal. The OCCA adjudicated the claim. Therefore, this Court may grant habeas corpus relief only if Petitioner satisfies the § 2254(d) standard as discussed above. After reviewing the record in this case, the Court finds Petitioner has failed to make the requisite showing.

Habeas corpus relief is available for prosecutorial misconduct only when the prosecution's conduct is so egregious in the context of the entire trial that it renders the trial fundamentally unfair. Donnelly v. DeChristoforo, 416 U.S. 637, 642-648 (1974); Cummings v. Evans, 161 F.3d 610, 618 (10th Cir.1998), cert. denied, --- U.S. ----, 119 S.Ct. 1360, 143 L.Ed.2d 521 (1999). Inquiry into the fundamental fairness of a trial requires examination of the entire proceedings. Donnelly, 416 U.S. at 643. "To view the prosecutor's statements in context, we look first at the strength of the evidence against the defendant and decide whether the prosecutor's statements plausibly could have tipped the scales in favor of the prosecution." Fero v. Kerby, 39 F.3d 1462, 1474 (10th Cir. 1994) (quotations omitted); see also Smallwood v. Gibson, 191 F.3d 1257, 1275-76 (10th Cir. 1999).

³The subject arose when the prosecutor, for impeachment purposes, was inquiring of Petitioner concerning a letter which he admittedly wrote to Kevin Ross stating that "oh, yeah, and the beer caper, if I plead guilty, there would go my appeal and a chance for a time cut." See #4, Trans. at 268-270.

After reviewing the entire trial transcript, this Court does not find the OCCA's rulings to be an unreasonable application of constitutional law. Even assuming that the specific instances of alleged misconduct were improper, this Court finds, based on careful review of the record of the entire proceedings, that none of the prosecutor's comments were of sufficient magnitude to influence the jury's decision. In light of the considerable evidence establishing Petitioner's guilt, there is no reasonable probability that the verdict in this case would have been different without the alleged misconduct. Therefore, the Court concludes that the proceedings against Petitioner were not rendered fundamentally unfair by prosecutorial misconduct. Petitioner is not entitled to habeas relief on this claim.

CONCLUSION

After carefully reviewing the record in this case, the Court concludes that the Petitioner has not established that he is in custody in violation of the Constitution or laws of the United States.

ACCORDINGLY, IT IS HEREBY ORDERED that the petition for a writ of habeas corpus is denied. The Clerk is directed to send a copy of this Order to the Tenth Circuit Court of Appeals.

SO ORDERED this 3/ day of May

, 2000.

PHOMAS R. BRETT, Senior Judge

UNITED STATES DISTRICT COURT

FILED

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

MAY 31 2000 /

Phil Lombardi, Clerk U.S. DISTRICT COURT

Petitioner,	
	No. 98-CV-027 B (J)
Respondent.	ENTERED ON DOCKET MAY 3 1 2000
))))

JUDGMENT

This matter came before the Court upon Petitioner's 28 U.S.C. § 2254 petition for writ of habeas corpus. The Court duly considered the issues and rendered a decision herein.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that judgment is hereby entered for Respondent and against Petitioner.

SO ORDERED THIS 3/day of _______

_, 2000

THOMAS R. BRETT, Senior Judge UNITED STATES DISTRICT COURT

Γ MA	Phil Lor	I L	E 2000 Clerk	D
No. 9	01-CV-13	37-E/	/	

MARCUS R. MILLER,

Petitioner,

vs.

Case N

EDWARD EVANS, Warden,

Respondent.

DATE MAY 31 2000

JUDGMENT

This matter came before the Court upon the 28 U.S.C. §2254 Petition of Marcus R. Miller.

The Court duly considered the issues and rendered a decision herein, dismissing the Petition as an abuse of the writ.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that judgment is hereby entered for Respondent, Edward Evans, and against Petitioner, Marcus R. Miller, on all issues.

IT IS SO ORDERED THIS 30 DAY OF MAY, 2000.

JAMES O. ELLISON, SENIOR JUDGE UNITED STATES DISTRICT COURT

TELEPHONE OF GREATER TULSA,) MAY 3 1 car	11-
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L.L.C., an Oklahoma Limited) Liability Company) Phil Lombardi Clark	, v
Liability Company) Phil Lombardi, Clerk) Output District Court	
Plaintiff,	
)	
vs.) Case No. 99-CV-259-E(J) /	
BOARD OF ADJUSTMENT OF THE)	
CITY OF BARTLESVILLE, OKLAHOMA)	
Defendant) ENTERED ON DOCKET	
MAY 3 1 2000	
DATE DATE	

In accord with the Order filed this date sustaining the Plaintiff's Motion for Summary Judgment, the Court hereby enters judgment in favor of the Plaintiff, United States Cellular Telephone of Greater Tulsa and against the Defendant, Board of Adjustment, City of Bartlesville, Oklahoma.

IT IS SO ORDERED THIS **30** DAY OF MAY, 2000.

JAMES O. ELLISON, SENIOR JUDGE UNITED STATES DISTRICT COURT

•	FILED
UNITED STATES CELLULAR	
TELEPHONE OF GREATER TULSA,	MAY 3 0 2000 /
L.L.C., an Oklahoma Limited) /
Liability Company	Phil Lombardi, Clerk U.S. DISTRICT COURT
Plaintiff,	
vs.	Case No. 99-CV-259-E(J)
BOARD OF ADJUSTMENT OF THE))
CITY OF BARTLESVILLE, OKLAHOMA)
) ENTERED ON DOCKET
Defendant	DATE MAY 31 2000
	DATE MAY 31 2000

<u>ORDER</u>

Now before the Court is Motion for Summary Judgment (Docket # 6) of Plaintiff, United States Cellular ("USC"). This dispute involves the application of the Telecommunications Act of 1996 ("TCA"), 47 U.S.C. §332(c)(7) and (8) to a decision of the Board of Adjustment of the City of Bartlesville, Oklahoma ("BOA") which denied the Plaintiff's application for a special zoning permit to construct a monopole transmission tower within the City of Bartlesville ("City"). As discussed below, the Court finds that the Defendant has violated the provisions of the TCA and the Plaintiff is entitled to summary judgment as a matter of law.

BACKGROUND

When the TCA was enacted, Congress extended federal court jurisdiction to local zoning matters if such matters affected the placement of communications antennae needed

for the transmission of wireless communications. In doing so, Congress did not prohibit, but substantially restricted the ability of local zoning boards to deny zoning applications for wireless communications entities covered by the TCA. USC is a member of one of the categories of communications entities described in the TCA. USC requested a special zoning permit to erect a monopole cellular communications tower on land currently zoned RS/10. Under the relevant zoning code, a cellular transmission tower may be built on land zoned RS/10 after the granting of a special zoning permit by the BOA. Under the code, the BOA is to consider certain factors in determining whether to grant a special zoning permit. A hearing was held before the BOA on March 25, 1999. After USC presented the BOA with information supporting its application, nearby property owners objected to the location of the tower and stated their reasons and concerns. Following the presentations by both sides, the BOA voted to deny USC's application. USC has brought this action as an appeal of the decision of the BOA. The record for review of the zoning ruling is compiled by the BOA. It is therefore appropriate to adjudicate such an appeal on a summary judgment motion with the administrative record providing the undisputed factual basis for the federal court's decision.

DISCUSSION

A. Facts

The Court finds that the following material facts are not in dispute. USC provides wireless telecommunications service in, among other areas, the City of Bartlesville. Because its existing towers are at full capacity and there is a high demand in the area, resulting in

dropped call and static, and because of the topography of the area, USC is in need of a tower in the Circle Mountain Estates addition in the City. The tower needed by USC is a 140 foot tower, with 10 foot antennas closely hugging the tower and extending from the top of the tower. USC located a parcel of land 50 feet by 50 feet, which is suitable for its needs, in a tract of undeveloped land in the Circle Mountain Estates. The land in question is currently zoned RS/10. The nearest residence to the site is at least a quarter of a mile in distance. USC entered into a lease with the owner of the land, Circle Mountain Estates, Inc. Although USC undertook efforts to locate other parcels of land in the area which would suit its needs and was for sale or lease, USC was unable to locate any such property. Thus, the parcel of property for which USC sought a special zoning permit was the only parcel available for sale or lease which would meet USC's needs in the area.

Under the zoning code of the City, a cellular transmission tower may be built on land zoned RS/10 after the granting of a special zoning permit by the BOA. The City's zoning code provides that the BOA is to consider certain factors in determining whether to grant a special zoning permit. The relevant factors are as follows:

10.58 No such special zoning permit shall be granted by the Board of Adjustment unless it meets all of the following findings:

- A. That the use as described by the applicant will comply with all provisions and /or conditions established therefor by these regulations, and
- B. That the use will not, in the circumstances of the particular case constitute a nuisance, be injurious to the neighborhood or otherwise detrimental to the public welfare.
- C. That the proposed structure or use conforms to the requirements and intent of these regulations, and
- D. That any additional conditions stipulated by the Board of

Adjustment as deemed necessary in the public interest have been met.

In addition, under new regulations to be adopted by the City, towers are to be galvanized metal monopoles, and co-location (the placement of multiple antennas on a single tower) is to be encouraged wherever practical.

On January 12, 1999, USC filed an application with the BOA for a special zoning permit to allow up to a 150 foot monopole cellular transmission tower in the Circle Mountain Estates area. A site plan was submitted by USC with the application. After an initial postponement, the application was set to be heard on March 25, 1999. At the March 25th hearing before the BOA, USC submitted to the BOA a packet of written materials which contained, among other things, a response to certain concerns expressed by the staff of the BOA. In addition, USC addressed the BOA orally and presented slides. In its presentation, USC demonstrated the following:

- 1. The parcel of land upon which the proposed tower was to be built was vacant and undeveloped and is located at the end of a dirt and gravel road that is 975 feet long. In Addition, the beginning of the dirt and gravel road is approximately a quarter mile from the portion of Circle Mountain Estates that has been developed. The owner of the land who is leasing the site to USC is the owner and developer of all the land adjacent to the site.
- 2. For aesthetic reasons, the tower would be a galvanized metal monopole (as opposed to at lattice type or guyed tower), with slim antennas one foot wide and extending approximately 10 feet above the tower on three sides, closely hugging the tower.
- 3. The FAA had given its approval for the 150 foot tower at this site.
- 4. Additional co-location sites would be engineered into the tower so that in the future fewer towers would be necessary in the area.
- 5. The use of the property would comply with all provisions and conditions established by the City's regulations.
- 6. USC would replace what is presently a mound of dirt, which is intended to

- keep four-wheelers off adjacent property, but which has not had that effect, with a fence and gate which would keep the four-wheelers off the adjacent property.
- 7. The use would not constitute a nuisance, be injurious to the neighborhood, or otherwise be detrimental to the public welfare.
- 8. The structure and use would conform to the requirements and use of both the present regulations and the regulations recently adopted by the City and soon to be effective.
- 9. USC was willing to meet any additional conditions with respect to the site stipulated by the BOA as deemed necessary in the public interest.

USC had spent 6 months attempting to find another location which would meet the needs of USC to provide non-static and uninterrupted service in the area but USC was unsuccessful in located such a tract of land.

Several nearby landowners appeared at the hearing to protest USC's application. The landowners voiced their concerns that the tower was ugly, that it was a danger to the air traffic flying into the Bartlesville airport and that it would lower the property values of the houses within Circle Mountain Estates.

At the conclusion of the March 25, 1999 hearing, the BOA denied USC's application without any statement as to the reasons the application was denied. At the regular meeting of the BOA held on April 22, 1999, the BOA voted to adopt a written "Record of Decision" which stated four grounds for denying USC's application.²

¹The City adopted USC's uncontroverted statement of facts with the exception of this paragraph 7. The City states in its response brief that it does not agree that this paragraph is uncontroverted, but the City does not submit any evidence to the Court which controverts USC's evidence.

²The written decision states the following grounds for denial of the application:

1. Said application presents visual and aesthetic concerns with no measures to mitigate the proposed tower's negative aesthetic impact. Applicant was advised by the Board of Adjustment

B. Summary Judgment Standard

Summary judgment pursuant to Fed.R.Civ.P. 56 is appropriate where "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Celotex Corp. v. Catrett,* 477 U.S. 317, 322-23 (1986); *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 250 (1986); *Windon Third Oil & Gas v. FDIC,* 805 F.2d 342 (10th Cir. 1986). In *Celotex,* the court stated:

The plain language of Rule 56(c) mandates the entry of summary judgment... and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.

477 U.S. at 317 (1986). To survive a motion for summary judgment, nonmovant "must establish that there is a genuine issue of material facts..." The evidence and inferences therefrom must be viewed in a light most favorable to the nonmoving party. *Conaway v.*

resolve such visual and aesthetic concerns. To the Board's knowledge, no such meeting occurred:

^{2.} Said application does not promote the preservation of the wooded character of the Circle Mountain residential area and compromises plans for the future growth of the Circle Mountain subdivision into this partially improved area wherein which the tower site is proposed. Said area, zoned for single-family residential development, has been partially improved in anticipation of the future growth of this residential subdivision;

^{3.} Said application presents a reasonable potential to add to the existing attractive nuisance of the area wherein the tower site is proposed. This nuisance, which involves trespassing, lighting of fires, and disturbing the peace, thereby compromising the safety of adjoining properties, could reasonably be further exacerbated by the removal of existing road blocks into the area (large rocks, boulders and dirt) which has served as a deterrent; and

^{4.} Said tower, while seemingly approved by the Federal Aviation Administration, could nonetheless reasonably present a safety concern due to the proposed tower's location within close proximity to the flight pattern for the Bartlesville Municipal Airport, and said airport administrators had not been consulted by the FAA in completing their aeronautical study of the proposed tower site.

Smith, 853 F.2d 789, 792 n. 4 (10th Cir. 1988). Unless the moving party can demonstrate its entitlement beyond a reasonable doubt, summary judgment must be denied. Norton v. Liddel, 620 F.2d 1375, 1381 (10th Cir. 1980).

C. Requirement of the Telecommunications Act of 1996

In the TCA, Congress enacted two procedural safeguards as requirements for zoning agencies when assessing zoning applications for the wireless communications industry. First, the Act requires that any adverse decision against a personal wireless services provider be in writing. 47 U.S.C. § 332(c)(7)(B)(iii); Second, the decision must be supported by "substantial evidence." 47 U.S.C. § 332(c)(7)(B)(iii). The requirement that the BOA's decision be in writing was satisfied by the "Record of Decision" which was adopted by the BOA on April 22, 1999. The time delay between the hearing date and the official adoption of the written decision is not unreasonable and does not effect the requirement of having a "decision in writing". However, the Court finds that there is not substantial evidence to support the written decision.

The substantial evidence standard is the traditional standard of review applied to agency determinations:

[S]ubstantial evidence has been defined as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Under this definition, a court may not displace an agency's "choice between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it de novo." Likewise, in the context of the [Telecommunications Act of 1996], the court must affirm a board's decision "even if the court would decide the matter differently."

Omnipoint Communications, Inc. v. Penn Forest Township, 493 F. Supp. 2d. 493, 500 (M.D.

Pa. 1999) citing Cellular Tele. Co. v. Zoning Bd. of Adjustment of the Borough of Ho-Ho-Kus, 24 F. Supp. 2d 359, 365-66 (D.N.J.1998), reversed on other grounds, 197 F.3d 64 (3rd Cir. 1999); see also PrimeCo Personal Communications v. Village of Fox Lake, 26 F. Supp.2d 1052 at 1063 (E.D. Ill. 1998) ("Substantial evidence is more than a scintilla of evidence but less than a preponderance; it is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."); Geske & Sons, Inc. v. NLRB, 103 F.3d 1366, 1374-75 (7th Cir.), cert. denied, 522 U.S. 808, 118 S.Ct. 46, 139 L.Ed.2d 13 (1997). The local zoning authority bears the burden of demonstrating that substantial evidence existed to support its denial. Cellco Partnership v. Town Plan and Zoning Commission of the Town of Farmington, 3 F. SUPP.2d at 182 (D. Ct. 1998).

A written decision to be reviewed by the court cannot simply rely upon conclusory statements, but must provide some evidentiary basis to support each statement. *Omnipoint Communications, Inc. v. Foster Township,* 46 F. SUPP. 2d 396 (M.D. Pa 1999), see also Virginia Metronet, Inc. v. Board of Supervisors of James City County, 984 F. SUPP. 966, 973 (E. D. Va.1998). And the "generalized concerns" voiced by opponents will not provide substantial evidence for an adverse decision against a personal wireless services provider. See PrimeCo Personal Communications, supra, at 1063 ("Under this standard, unsupported constituent testimony opposing cellular tower locations generally will not satisfy the substantial evidence test."); Omnipoint Corp. v. Zoning Hearing Bd. of Pine Grove Township, 20 F. SUPP.2d 875, 880 (E. D. Pa.1998) ("Generalized concerns and conclusive statements within the record about the aesthetic and visual impacts on the neighborhood do

not amount to substantial evidence."); *Illinois RSA No. 3, Inc. v. County of Peoria*, 963 F. Supp. 732, 745 (C.D. Ill.1997) ("But under substantial evidence review, the mere existence of opposition is insufficient to support an agency decision against a request. Instead, the agency must rely upon more than a scintilla of evidence that a decision against the request is warranted under the agency's criteria."); *Western PCS II Corp. v. Extraterritorial Zoning Auth. of the City and County of Sante Fe*, 957 F. Supp. 1230, 1236 (D.N.M.1997) (generalized concerns of five neighbors failed to constitute substantial evidence for denial of requested application); *BellSouth Mobility Inc. v. Gwinnett County*, 944 F. SUPP. 923, 928 (N. D. Ga.1996) (generalized concerns do not amount to substantial evidence).

Section 10.58 of the Bartlesville zoning code states that a special zoning permit cannot be issued unless four conditions have been met. The BOA has stipulated that the requirements of subparagraphs A, C &D have been met by USC. The BOA asserts that the proposed use does not meet the requirements of §10.58 (B) requiring that a use not constitute a nuisance, be injurious to the neighborhood, or otherwise detrimental to the public welfare. In addition, the written decision adopted by the BOA on April 22, 1999 stated four grounds for denying USC's application.

The first ground for denial of the application was visual and aesthetic concerns. The questions concerning aesthetics of the proposed monopole could best be described as "generalized concerns" of residents of who live more than a quarter mile away. These concerns were not substantiated. Such unsubstantiated "generalized concerns" do not constitute substantial evidence under the Telecommunications Act.

The second ground for denial of the application was that the use does not promote the preservation of the wooded character of the Circle Mountain area and compromises plans for the future growth of the Circle Mountain subdivision. However, any requirement that the tower promote the preservation of the wooded character of the area was never discussed at the hearing and there was not substantial evidence that it would harm such a cause. Further, there was no evidence presented that the monopole would compromise future development of the area. The portion of the Circle Mountain subdivision that has been developed so far was developed by the same company that is leasing the land to USC and the same company that owns all of the undeveloped land in the subdivision. It seems highly unlikely that this developer would jeopardize the value of the remaining undeveloped land just for the opportunity to lease a 50 foot by 50 foot tract to USC.

The third ground for denial of the application was that the existence of the monopole would further exacerbate the already existing nuisance in the area of teenagers trespassing on the undeveloped property. No evidence was offered to support this other than the speculation of homeowners that such would be the case. The monopole cannot be blamed for a nuisance that already exists. The evidence shows that, if anything, the area might be more secure to trespassers due to the fencing that was going to be installed by USC.

The last ground stated for denying USC's application is that the proposed monopole poses a safety concern to air traffic using the Bartlesville Municipal Airport. Again, there is no evidence to support this conclusion. Two homeowners speculated that the monopole could cause concern for air traffic using the airport, but the record shows that the FAA had

approved the location of the monopole in writing and determined that the tower was not tall enough to require warning lights to be installed on it.

In conclusion, the Court finds that there is not substantial evidence to support the BOA's denial of USC's application for a special zoning permit to construct a galvanized monopole, not to exceed 150 feet in height, on the tract of land in question.

IT IS THEREFORE ORDERED ADJUDGED AND DECREED that the Plaintiff's Motion for Summary Judgment is hereby granted and the Defendant, Board of Adjustment of the City of Bartlesville, Oklahoma is hereby ordered to approved the Plaintiff's Application for Special Zoning Permit to construct the monopole transmission tower in question.

Dated this 36 day of May, 2000.

JAMES O. ELLISON, SENIOR JUDGE UNITED STATES DISTRICT COURT

IN THE UNITE	O STATES DISTRICT COURT	1
FOR THE NORTHI	ERN DISTRICT OF OKLAHOMA	MAY
		Phillo
ER,)	S. DISTRIC

MARCUS R. MILLER,

Petitioner,

vs.

Case No. 91-CV-137-E

EDWARD EVANS, Warden,

Respondent.

Petitioner,

Case No. 91-CV-137-E

ENTERED ON DOCKET

DATE 4AY 31 2000

ORDER

This Court previously considered, pursuant to Rule 4, Rules Governing Section 2254 Cases in the United States District Courts, the papers and pleadings filed in this action.\(^1\) Based on the previous review, and the fact that Petitioner had filed a prior \§2254 petition this court, collaterally attacking the same convictions he is attacking now, the Court directed Petitioner to show cause why his petition should not be barred under Rule 9(b) and McCleskey v. Zant, 499 U.S. 467 (1991).

Petitioner brings the current §2254 petition attacking his convictions in CRF-79-3608, CRF-79-3880, CRF-80-396, CRF-80-664, and CRF-80-750, on the grounds that 1) the state and trial court could not add time to petitioner's plea agreement because he committed three additional offenses, 2) ineffective assistance of counsel, 3) failure to advise petitioner of the full ramifications of his plea

¹ The Court notes that, though this Petition was submitted on March 6, 1991, Mr. Miller's Motion to Proceed In Forma Pauperis was denied by the Court, and the Petition was not filed until July 23, 1991, when Mr. Miller submitted his required filing fee. Nonetheless, due to clerical error on the part of the Court Clerk, this file was not opened at the time of the submission of the fee, and was not brought to the Court's attention until May 20, 1999. There is no record in the file of Petitioner making inquiries about his Petition either by pleading or correspondence during this entire time, or making any attempt to prosecute these claims.

of guilty, 4) that his sentence as a habitual criminal is unconstitutional, 5) that his guilty plea was not a voluntary and intelligent choice, and 6) that the Court erred by failing to find a "factual basis" for his plea of guilty. The records of the court reflect that Petitioner has filed a prior §2254 petition in this court, collaterally attacking his convictions in CRF-79-3608, CRF-79-3880, CRF-80-296, CRF-80-664, and CRF-80-750. See Case No. 82-C-505-E. Case No. 82-C-505-E was denied on the merits on July 28, 1983, when the Court affirmed and adopted the Findings and Recommendations of the Magistrate Judge filed on July 14, 1983. Petitioner appealed this decision, and on May 8, 1984, it was affirmed by the Court of Appeals.

Legal Analysis

Prior to the enactment of the AEDPA, Rule 9(b) governed the filing of a second or successive petition. Rule 9(b) provides as follows:

(b) Successive Petitions. A second or successive petition may be dismissed if the judge finds that it fails to allege new of different grounds for relief and the prior determination was on the merits or, if new ans different grounds are alleged, the judge finds that the failure of the petitioner to assert those grounds in a prior petition constituted an abuse of the writ.

In McClesky v. Zant, 499 U.S. 467, 111 S.Ct. 1454, 113 L.Ed. 2d 517 (1991), the Supreme Court held that to avoid a dismissal on abuse of the writ grounds, a petitioner must show "cause" for failing to include the new claim in a previous federal petition and "prejudice" from the claimed error. "The requirement of cause in the abuse of the writ context is based on the principle that [the] petitioner must conduct a reasonable and diligent investigation aimed at including all relevant claims and grounds for relief in the first federal habeas petition." McClesky, 499 U.S. at 498, 111 s.Ct. at 1472. To demonstrate cause, the petitioner must show that some "external impediment, whether it be government interference or the reasonable unavailability of the factual basis for the claim, must

have prevented [the] petitioner from raising the claim. . . . [T]he question is whether [the] petitioner possessed, or by reasonable means could have obtained, a sufficient basis to allege a claim in the first petition and pursue the matter through the habeas process." McGary v. Scott, 27 F.3d 181, 184 (5th Cir. 1994)(quoting McClesky, 499 U.S. at 498, 111 S.Ct. at 1472). In the event the petitioner cannot establish cause, a court may excuse abuse of the writ if the petitioner can show that a fundamental miscarriage of justice would result from a failure to entertain the claim. McClesky, 499 U.S. at 494-95, 111 S.Ct. at 1470. A "fundamental miscarriage implies that a constitutional violation probably caused the conviction of an innocent person." McGary, 27 F.3d at 184 (quoted cases omitted).

In this case, although directed to show cause for failure to raise the issues in this habeas action previously, Miller addressed only one of his alleged errors, ineffective assistance of counsel. In his response to the Court's Order, however, Miller argues the merits of his ineffective assistance of counsel claim rather that showing cause for his failure to raise the issue previously. The Court specifically finds that there is no cause for his failure to raise the issue in his 1982 habeas case. Miller's ineffective assistance of counsel claim has to do with his appellate counsel's failure to file a designation of record or brief in support of his appeal of the denial of post-conviction relief. Miller clearly was aware of that ground for relief prior to filing his 1982 habeas case. In its November 25, 1981 order affirming the Order of the trial court denying post-conviction relief, the Court of Criminal Appeals stated: "On the record before us, the issue of whether the trial court erred in failing to remand the first two burglary charges for preliminary hearing has not been properly preserved for review. . . "

Because Miller has not established "cause" for failing to include his new claims in his previous federal petition, or a fundamental miscarriage of justice, his present habeas corpus petition

is DISMISSED as an abuse of the writ under rule 9(b).

IT IS SO ORDERED THIS _____DAY OF MAY, 2000.

JAMES O. ELLISON, SENIOR JUDGE UNITED STATES DISTRICT COURT

UNITED STATES DISTRICT COURT FOR THE FILED

ROBERT D. LOWERY,) mM 2 1 5000 (
Plaintiff,	Phil Lombardi, Clerk U.S. DISTRICT COURT
v.	No. 99-CV-1039-M
KENNETH S. APFEL, Commissioner of the Social Security Administration,	ENTERED ON DOCKET
Defendant,	DATE MATO 1 ZUUU

ADMINISTRATIVE CLOSING ORDER

This case was remanded to the Commissioner of Social Security under sentence six of 42 U.S.C. §405(g). In accordance with N.D. LR 41, it is hereby ordered that the Clerk administratively close this action. This case may be reopened for final determination upon application of either party once the proceedings before the Commissioner are complete.

IT IS SO ORDERED.

Dated this 31 day of MAY, 2000.

FRANK H. McCARTHY -

UNITED STATES MAGISTRATE JUDGE



FILED

MAY 3 1 2000 (

ROBERT D. LOWERY,	Phil Lombardi, Clerk u.s. district court
Plaintiff,	/
v. (Case No. 99-CV-1039-M √
KENNETH S. APFEL, Commissioner of) the Social Security Administration,	ENTERED ON OCICKET MAY 3 1 2000
Defendant.	DATE WAT O'A

ORDER

Upon the motion of the defendant, Commissioner of the Social Security Administration, by Stephen C. Lewis, United States Attorney of the Northern District of Oklahoma, through Cathryn McClanahan, Assistant United States Attorney, and for good cause shown, it is hereby ORDERED that this case be remanded to the Commissioner for further administrative action pursuant to sentence 6 of section 205(g) and 1631(c)(3) of the Social Security Act, 42 U.S.C. 405(g) and 1383(c)(3).

DATED this JI ST day of MAY 2000.

FRANK H. McCARTHY

United States Magistrate Judge



SUBMITTED BY:

STEPHEN C. LEWIS United States AND THE

AXAMIN MCCLAMAHAN, OBA #14853 Assistant United States Attorney 333 West 4th Street, Suite 3460

Tulsa, Oklahoma 74103-3809

FILED

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

MAY 3 0 2008

JAMA DILBECK,)	Phil Lombardi, Cler U.S. DISTRICT COURT
Plaintiff,)	
v.)	Civil No. 99-685-M
KENNETH S. APFEL, Commissioner of Social Security,)))	ENTERED ON DOCKET
Defendant.)	DATE

JUDGMENT

This action has come before the Court for consideration upon an unopposed Motion to Reverse and Remand for Further Administrative Action. An Order reversing and remanding the case to the Commissioner has been entered.

Judgment for Plaintiff and against Defendant is hereby entered pursuant to the Court's Order and in accordance with Fed. R. Civ. P. 58.

THUS DONE AND SIGNED on this 30 th day of may, 2000.

Frank H. McCarthy

United States Magistrate Judge

14

FILED

	MAY 3 0 2000 72
JAMA DILBECK,) Phil Lombardi, Clerk U.S. DISTRICT COURT
Plaintiff,)
v.) Civil No. 99-685-M
KENNETH S. APFEL, Commissioner of Social Security,	ENTERED ON DOCKET
Defendant.) DATE MAY 3.1.2000

ORDER

Upon the unopposed motion of Defendant, Commissioner of the Social Security Administration, by Stephen C. Lewis, United States Attorney of the Northern District of Oklahoma, through Katauna J. King, Special Assistant United States Attorney, it is hereby ORDERED that this case be reversed and remanded to the Commissioner for further administrative action pursuant to sentence four (4) of § 205(g) of the Social Security Act, 42 U.S.C. § 405(g). Melkonyan v. Sullivan, 501 U.S. 89 (1991). Upon remand, the Administrative Law Judge will review all of the medical evidence of record and make specific findings regarding Plaintiff's mental residual functional capacity. If necessary, the Administrative Law Judge shall obtain additional mental examinations and residual functional capacity assessments. A vocational expert should be called to testify regarding jobs available to a person sharing Plaintiff's vocational profile.

THUS DONE AND SIGNED on this 30 th day of MAY, 2000.

Frank H. McCarthy

United States Magistrate Judge

THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA (Transferred from the Central District of California)

OKLAHOMA PLAZA INVESTORS, LTD., a California limited partnership,	MAY 3) 2000 Phil Lombard, Oracle U.S. DISTRICT COURT
Plaintiff,)
vs.) Case No. 98-CV-844 E (M)
TRAVELERS INSURANCE COMPANY, a Corporation, and Does 1-50,	ENTERED ON DOCKET
Defendant.	DATE MAY 3 0 2000

JOINT STIPULATION FOR DISMISSAL WITH PREJUDICE

The Plaintiff, Oklahoma Plaza Investors, Ltd., a California limited partnership, appearing by its counsel, Neal E. Stauffer and Adam S. Denton, of Stauffer, Rainey, Gudgel and Hathcoat, P.C., and the Defendant, Travelers Insurance Company, a corporation, appearing by its counsel, Philip J. McGowan, of Carpenter, Mason & McGowan, hereby jointly stipulate that this Court should enter an Order of Dismissal With Prejudice of the claims by the Plaintiff, Oklahoma Plaza Investors, Ltd., a California limited partnership, against the Defendant, Travelers Insurance Company, a corporation, and listed Defendant's Does 1-50 with prejudice and in support thereof would show this Court as follows:

1. That the Plaintiff, Oklahoma Plaza Investors, Ltd., a California limited partnership, and the Defendant, Travelers Insurance Company, a corporation, have reached an agreement whereby the claims of the Plaintiff against the Defendant, Travelers Insurance Company, have been settled and compromised.

Y

2. That since all issues between the Plaintiff and the Defendant, Travelers Insurance Company, have been resolved and there was no naming of Defendants denominated as Does 1-50, nor service upon them, there is no further need to continue legal proceedings in this case.

WHEREFORE, the Plaintiff, Oklahoma Plaza Investors, Ltd., a California limited partnership, and the Defendant, Travelers Insurance Company, a corporation, hereby stipulate that this Court should enter a Dismissal With Prejudice of the claims of the Plaintiff against all of the Defendants.

Respectfully submitted,

STAUFFER, RAINEY, GUDGEL & HATHCOAT, P.C.

Weal E. Stauffer, OBA #13168

Adam S. Denton, OBA #17015 601 South Boulder

1100 Petroleum Club Building

Tulsa, Oklahoma 74119

(918) 592-7070

Attorneys for Plaintiff

CARPENTER, MASON & McGOWAN

Philip J. McGowan, QBA #5997

1516 South Boston Avenue, Suite 205

Tulsa, Oklahoma 74119-4013

(918) 584-7400 Fax: (918) 584-7161

Attorney for Defendant

SM

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA F I L E

BED-CHECK CORPORATION	MAY 2 6 2000
Plaintiff,) Phil Lombardi, Clerk U.S. DISTRICT COURT
vs.) Case No. 99CV0591BU(E)
KOREGON ENTERPRISES, INC.	
Defendant.	ENTERED ON DOCKET

JOINT STIPULATED DISMISSALS

COME NOW Plaintiff, BED-CHECK CORPORATION ("Bed-Check"), and Defendant, KOREGON ENTERPRISES, INC., by and through their respective undersigned counsel, and hereby submit, pursuant to Federal Rules of Civil Procedure No. 41(a)(1) and 41(c), this stipulated dismissal, thereby dismissing all claims in the above-styled suit.

Each Party shall bear its own costs, attorney's fees and litigation expenses incurred in connection with the above-styled case.

Respectfully submitted,

FOR THE PLAINTIFFS:

Terry L. Watt (OBA # 16,745)
Roy C. Breedlove (OBA # 1,097)
FELLERS, SNIDER, BLANKENSHIP,
BAILEY & TIPPENS, P.C.
321 South Boston, Suite 800
Tulsa, Oklahoma 74103-3318

(918) 599-0621

FOR THE DEFENDANTS:

Randy Witzke (OBA #10529) EDMONDS, COLE, HARGRAVE, GIVENS & WITZKE One North Hudson, Suite 200 Oklahoma City, OK 73102 (405) 272-0322

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

TORANCE LACOUR,	ENTERED ON DOCKET
Plaintiff,) DATE MAY 3 0 2000
VS.) Case No. 99-CV-1028-K (J)
TULSA COUNTY BOARD OF COUNTY COMMISSIONERS; THE CITY OF TULSA; THE TULSA CITY-COUNTY JAIL; TULSA COUNTY SHERIFF'S DEPARTMENT; and STANLEY GLANZ, Defendants.	Phil Lombardi, Clerk U.S. DISTRICT COURT

On December 2, 1999, Plaintiff, appearing pro se, filed this 42 U.S.C. § 1983 civil rights complaint (Docket #1). Plaintiff also filed an affidavit of financial status (#2). On January 12, 2000, the Court permitted Plaintiff to maintain this action without prepayment of fees and costs (#5). Plaintiff has filed an amended complaint (#7) adding Stanley Glanz and the Tulsa County Sheriff's Department as additional defendants.

ORDER

Before the Court are the following motions: the motion to dismiss filed by Defendants Tulsa County Board of County Commissioners and the "Tulsa City-County Jail" (#3), the motion to stay proceedings pending preparation of a 28 U.S.C. 1915(d) frivolity review report and for enlargement of time to answer filed by Defendants Tulsa County Board of County Commissioners and the "Tulsa City-County Jail" (#12), and the motion to dismiss, or in the alternative motion for summary judgment filed by Defendant City of Tulsa (#13). The parties have also submitted a Case Management Plan as required by the Local Rules of this Court.



A. Motions filed by Defendants Tulsa County Board of County Commissioners and the "Tulsa City-County Jail"

Defendants Tulsa County Board of County Commissioners (hereafter "County") and the "Tulsa City-County Jail" have moved to dismiss this action pursuant to Fed. R. Civ. P. 12 (b)(6) for failure to state a cause of action (#3). In addition the County has also moved for a stay of these proceedings pending preparation of a special report and for an enlargement of time to answer (#12). As stated above, Plaintiff has filed his "amended petition and responce (sic) to motion to dismiss" (#7) in which he names the Tulsa County Sheriff's Department and Stanley Glanz as additional defendants. Plaintiff also provides more information concerning his claims against these defendants.

The purpose of a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6) is to test the sufficiency of the complaint, not to decide the merits of the case. A defendant must meet a high standard to have a complaint dismissed for failure to state a claim upon which relief may be granted. In fact, in ruling on a motion to dismiss, the Court must construe the complaint's allegations in the light most favorable to the plaintiff and take as true all well-pleaded facts and allegations in the plaintiff's complaint. Hall v. Bellmon, 935 F.2d 1106, 1109 (10th Cir. 1991); Meade v. Grubbs, 841 F.2d at 1512. The allegations of a complaint should be construed liberally and a complaint should not be dismissed for failure to state a claim "unless it appears beyond a doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-46 (1957); see also Meade, 841 F.2d at 1512 (citing Owens v. Rush, 654 F.2d 1370, 1378-79 (10th Cir. 1981)).

When reviewing a pro se complaint, as in this case, the Court must employ standards less stringent than if the complaint had been drafted by counsel. <u>Haines v. Kerner</u>, 404 U.S. 519, 520-21

(1972). However, in order to withstand a motion to dismiss, a complaint must allege facts sufficiently setting forth the essential elements of the cause of action. <u>Gray v. County of Dane</u>, 854 F.2d 179, 182 (7th Cir.1988).

The Court finds that, even if the allegations in Plaintiff's amended civil rights complaint are accepted as true, the amended complaint fails to state a claim upon which relief can be granted as to either the Tulsa County Sheriff's Department or the Tulsa City-County Jail. See, e.g., Fed. R. Civ. P. 12(b)(6) and Conley v. Gibson, 355 U.S. 41, 45-46 (1957) (setting forth standards for evaluating the sufficiency of a claim). Numerous courts have held that governmental sub-units or departments are not separate suable entities and are not proper defendants in a § 1983 action. Martinez v. Winner, 771 F.2d 424, 444 (10th Cir. 1985), vacated on other grounds, Tyus v. Martinez, 475 U.S. 1138 (1986); Johnson v. City of Erie, 834 F. Supp. 873, 878 (W.D. Pa. 1993); PBA Local No. 38 v. Woodbridge Police Dept., 832 F. Supp. 808, 826 (D. N.J. 1993). Therefore, Defendants Tulsa County Sheriff's Department and Tulsa City-County Jail should be dismissed from this case with prejudice pursuant to 28 U.S.C. §§ 1915(e)(2)(B)(ii).

As to Plaintiff's claims against the County and Stanley Glanz, Sheriff of Tulsa County, the Court finds his claims to be limited to those relating to medical treatment he received while detained at the Tulsa County Jail. To state a § 1983 claim for a violation of a convicted prisoner's Eighth

¹When ruling on a motion to dismiss for failure to state a claim upon which relief can be granted, the Court must accept all well-pled factual allegations in the complaint as true, and the Court must view all inferences that can be drawn from those well-pled facts in the light most favorable to plaintiff. Viewing the allegations in the complaint through this lens, the Court may grant a Rule 12(b)(6) motion only if "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley, 355 U.S. at 45-46. The Court finds that this same standard should be applied when deciding whether to dismiss a claim sua sponte under either 28 U.S.C. § 1915(e)(2)(B)(ii) or § 1915A(b)(1).

Amendment rights due to inadequate medical care, the prisoner must allege facts evidencing a deliberate indifference to his serious medical needs. Estelle v. Gamble, 429 U.S. 97, 104 (1976). Although Plaintiff may have been incarcerated at the Tulsa County Jail as a pretrial detainee rather than as a convicted prisoner, his right to receive adequate medical care is nonetheless protected by the Fourteenth Amendment and the standard for evaluating his claim under the Fourteenth Amendment is the same -- Plaintiff must allege "deliberate indifference to serious medical needs." Meade v. Grubbs, 841 F.2d 1512, 1530 (10th Cir. 1988); see also Garcia v. Salt Lake County, 768 F.2d 303, 307 (10th Cir. 1985).

"Deliberate indifference" is defined as knowing and disregarding an excessive risk to an inmate's health or safety. Farmer v. Brennan, 511 U.S. 825, 827, 114 S.Ct. 1970 (1994). In Wilson v. Seiter, 501 U.S. 294, 111 S.Ct. 2321 (1991), the Supreme Court clarified that the deliberate indifference standard under Estelle has two components: (1) an objective requirement that the pain or deprivation be sufficiently serious; and (2) a subjective requirement that the offending officials act with a sufficiently culpable state of mind. Id. At 298-99. Negligence does not state a claim under § 1983 for deliberate indifference to medical needs. Hicks v. Frey, 992 F.2d 1450, 1455 (6th Cir. 1993). In addition, differences in judgment between an inmate and prison medical personnel regarding appropriate medical diagnosis or treatment are not enough to state a deliberate indifference claim. Westlake v. Lucas, 537 F.2d 857, 860 n.5 (6th Cir. 1976).

The administering of an appropriate diet to a prisoner with diabetes is a matter of medical judgment. Plaintiff's claim that his diet at the Tulsa County Jail was inadequate indicates a mere difference in judgment, which as noted above, does not support a claim of deliberate indifference. Here, where Plaintiff's claims indicate he was treated for diabetes but he disagreed with the efficacy

of the treatment, he has, at best, alleged a claim for medical negligence. See Estelle, 429 U.S. at 107.

Furthermore, after liberally construing the amended complaint filed in this case, see <u>Haines v. Kerner</u>, 404 U.S. 519, 520-21 (1972); <u>Hall v. Bellmon</u>, 935 F.2d 1106, 1100 (10th Cir. 1991), the Court finds that Plaintiff's allegations of inadequate medical treatment are conclusory. Plaintiff does not provide any detail for the alleged denial of special diabetic diet. He does allege that the . . .

medical staff made an urgent call to administer treatment in the form of a dietary item.

The jail staff did not comply with the gist of reasoning or judgement of the medical staff in making such call . . .

when the staff delivered spoiled milk for Plaintiff's consumption. Although Plaintiff may have been dissatisfied when he received the spoiled milk, it is nonetheless clear that the medical staff at the jail did in fact provide medical treatment for his diabetes.

In addition, Plaintiff does not identify the physical injury, if any, he suffered while at Tulsa County Jail. He does not provide dates or describe specific incidents in support of his allegations, nor does he indicate who at the jail may have heard his "loud and vehement protest." (#7) Even with amendment, Plaintiff's complaint fails to put Defendants on notice of the claims against them and, therefore, should be dismissed for failure to state a claim.

Assuming arguendo that Plaintiff could somehow overcome these deficiencies in his inadequate medical treatment claim, the Court finds that Plaintiff has failed to state a claim against defendants Tulsa County and Stanley Glanz, Sheriff of Tulsa County, in either his individual or his official capacity. As to any claim asserted against Stanley Glanz in his individual capacity, it is well established that for a supervisor to be liable in a civil rights suit for the actions of others there must be an affirmative link between the supervisor and the constitutional deprivation. Meade v. Grubbs,

841 F.2d 1512, 1527. That link can take the form of personal participation, an exercise of control or discretion, or a failure to supervise. <u>Id.</u> Plaintiff must show that the defendant expressly or otherwise authorized, supervised, or participated in the conduct which caused the deprivation. <u>Snell v. Tunnell</u>, 920 F.2d 673, 700 (10th Cir. 1990), <u>cert. denied</u>, 499 U.S. 976 (1991). Absent such a link, a supervisor is not liable for the actions of his employees. <u>Id.</u> As to any claim against Sheriff Glanz in his individual capacity, Plaintiff has failed to allege an affirmative link sufficient to establish liability as to Sheriff Glanz.

Plaintiff has also failed to state a claim against either Sheriff Glanz, in his official capacity as Sheriff of Tulsa County, or against Tulsa County. In order to state a claim against a municipality under section 1983, a plaintiff must show that the municipality itself, through custom or policy, caused the alleged constitutional violation. Monell v. Dep't of Social Servs., 436 U.S. 658 (1978). There are two requirements for liability based on custom: (1) the custom must be attributable to the county through actual or constructive knowledge on the part of the policy-making officials; and (2) the custom must have been the cause of and the moving force behind the constitutional deprivation. Respondeat superior does not give rise to a section 1983 claim. Monell, 436 U.S. at 692-94; see also Jenkins v. Wood, 81 F.3d 988, 993-94 (10th Cir. 1996) (citing City of Canton v. Harris, 489 U.S. 378, 385 (1989)). Plaintiff's claims fail to establish either of these elements.

Because Plaintiff's complaint (#1) and amended complaint (#7) fail to state a claim against Defendants Tulsa County Board of County Commissioners, Tulsa County Sheriff's Department, Tulsa City-County Jail, and Stanley Glanz, in his individual and official capacities, those Defendants should be dismissed from this action. As a result, the motions to stay proceedings pending preparation of a special report and for enlargement of time to answer filed by Defendants Glanz and Tulsa County

Board of County Commissioners have been rendered moot and should be denied on that basis.

B. Motion to dismiss, or in the alternative motion for summary judgment filed by the City of Tulsa

On March 24, 2000, Defendant City of Tulsa (hereafter "City") filed its motion to dismiss, or in the alternative motion for summary judgment. The Court finds that Plaintiff's claims against Defendant City are those identified as "Counts I -- VI" in the original complaint. Plaintiff also provides additional information concerning his claims against Defendant City in his amended complaint.

To date, Plaintiff has failed to file a response to Defendant City's motion. However, upon a review of the motion, the Court notes that Defendant City attached matters outside the pleading for the Court's consideration. (See #13). After reviewing the record, the Court finds the material provided by Defendant should not be excluded from consideration of the motion. Therefore, pursuant to Fed. R. Civ. P. 12(b), the parties are hereby provided notice that the motion to dismiss, or in the alternative motion for summary judgment (#13) shall be treated as a motion for summary judgment and disposed of as provided in Fed. R. Civ. P. 56. Plaintiff shall respond to the motion for summary judgment and present, within fifteen (15) days of the entry of this Order, all material made pertinent to such a motion by Rule 56. See Fed. R. Civ. P. 12(b) and 56. Should Plaintiff fail to file a response to the motion as directed herein, the Court will deem the matter confessed and enter judgment in favor of Defendant City. See N.D. LR 7.1(C).

ACCORDINGLY, IT IS HEREBY ORDERED that:

(1) The motion to dismiss (#3) filed by Defendants Tulsa County Board of County Commissioners and the Tulsa City-County Jail is granted.

- Plaintiff's complaint (#1), as amended (#7), fails to state a claim upon which relief may be granted as to Defendants Tulsa County Board of County Commissioners, Tulsa City-County Jail, Tulsa County Sheriff's Department and Stanley Glanz, in his individual and official capacities, and those Defendants are dismissed from this action pursuant to 28 U.S.C. § 1915(e)(2)(B)(ii).
- (3) The motions to stay proceedings pending preparation of a special report and for enlargement of time to answer (#12) have been rendered **moot** and are denied on that basis.
- (4) Defendant City of Tulsa's motion to dismiss, or in the alternative motion for summary judgment (#13) shall be treated as a motion for summary judgment and disposed of as provided in Fed. R. Civ. P. 56.
- (5) Within fifteen (15) days of the entry of this Order, or by (20), 2000, Plaintiff shall file a response to the motion for summary judgment and present any and all material made pertinent to such motion by Fed. R. Civ. P. 56.
- (6) Should Plaintiff fail to file a response to the motion as directed herein, the Court will deem the matter confessed and enter judgment in favor of Defendant City of Tulsa. See N.D. LR 7.1(C).

SO ORDERED THIS 30 day of May, 2000

TERRY C. KERN, Chief Judge

UNITED STATES DISTRICT COURT

IN THE UNITED STATES I	L .T
FOR THE NORTHERN DISTR	ICT OF OKLAHOMA
CRUDE MARKETING & TRANSPORTATION,) INC., an Oklahoma Corporation,)	ICT OF OKLAHOMA MAY 3 0 2000 U.S. O'STRICT COURT
Plaintiff,	
vs.)	Case No. 99-C-1125-E
WASTE CONVERSION CORP., a Delaware Corporation, IMPERIAL PETROLEUM, INC., a) }
Nevada Corporation, and CARLETON B. FOSTER,) an Individual,	ENTERED ON DOCKET DATE MAY 30 2000
Defendants.	DATE

ORDER

Now before the Court is the Motion to Dismiss (docket #2) of the Defendants, Waste Conversion Corp. and Carleton B. Foster.

Foster seeks dismissal of plaintiff's complaint based on his assertion that "Waste conversion Corp. has never has any business contract or arrangement with Crude Marketing & Transportation, Inc. to construct, manufacture, deliver, debug or test any system, any process equipment, or any equipment configuration." Although the basis of defendants' motion to dismiss is somewhat unclear, the Court believes that defendants are denying the allegations of plaintiff's complaint. This is not a basis for dismissal, as a question of fact clearly exists at this time.

The Motion to Dismiss (docket #2) of the Defendants, Waste Conversion Corp. and Carleton B. Foster is DENIED. Waste Conversion Corp., as a corporation is directed to procure counsel within 30 days of the date of this Order, or default judgment will be entered. The Motion to Dismiss

(docket #3) of the Defendant Imperial Petroleum Inc., is most due to Plaintiff's dismissal of that entity without prejudice.

IT IS SO ORDERED THIS 30 DAY OF MAY, 2000.

JAMES O. ELLISON, SENIOR JUDGE UNITED STATES DISTRICT COURT

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	MAY	3 0	2000) [N

DOLPHIN MANUFACTURING COMPANY, INC., an Oklahoma corporation,	Phil Lombardi, Clerl U.S. DISTRICT COURT
Plaintiff,)	
vs.)	Case No. 99-CV-194 E (EA)
MOVIES & GAMES 4 SALE, L.P., a Delaware limited partnership, GAMES TRADER, INC.,	· }
a Canadian corporation, and COMERICA) BANK-TEXAS,)	ENTERED ON DOCKET
Defendants.	DATE MAY 3 0 2000

STIPULATION OF DISMISSAL WITHOUT PREJUDICE

Plaintiff, Dolphin Manufacturing Company, Inc. ("Dolphin"), and Defendant/Intervenor, Comerica Bank-Texas ("Comerica") hereby stipulate to the dismissal without prejudice of Dolphin's claims against Comerica in the above-styled action. Dolphin and Comerica further stipulate that the dismissal without prejudice shall not affect any rights Dolphin may have to appeal the Court's earlier ruling quashing Dolphin's garnishment proceedings.

Terry J. Tarwater, OBA # 16898

Of the Firm

CROWE & DUNLEVY, P.C.
500 Kennedy Building
321 South Boston Avenue
Tulsa, Oklahoma 74103
(918) 592-9800
ATTORNEYS FOR COMERICA BANK-TEXAS

706745

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Brian J. Rayment

KIVELL, FRANCIS & RAYMENT

7666 East 61st Street

Suite 240

Tulsa, Oklahoma 74133

ATTORNEYS FOR DOLPHIN MANUFACTURING

COMPANY, INC.

DATED this 30th day of Eebruary, 2000.

8m

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

MAY 2 5 2000 8

Phil Lomboud: ac.
Phil Lombardi, Clerk U.S. DISTRICT COURT
)
)
) Case No. 00CV115K(E) \(\square\)
ENTERED ON DOCKET
) CITICALD ON DOONE!
DATE MAY 8 0 2000

NOTICE OF DISMISSAL

COMES NOW the United States of America by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, Plaintiff herein, through Phil Pinnell, Assistant United States Attorney, and hereby gives notice of its dismissal, pursuant to Rule 41, Federal Rules of Civil Procedure, of this action without prejudice.

Dated this 25th day of May, 2000.

UNITED STATES OF AMERICA

Stephen C. Lewis United States Attorney

PHIL PINNELL, OBA #7169
Assistant United States Attorney
333 W. 4th Street, Suite 3460
Tulsa, Oklahoma 74103-3809
(918) 581-7463

CERTIFICATE OF SERVICE

This is to certify that on the 25 day of May, 2000, a true and correct copy of the foregoing was mailed, postage prepaid thereon, to: Fred Woodard, 2404 W. Washington Place, , Broken Arrow, OK 74012.

Debra L. Overstreet

Financial Litigation Agent

800

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

MAY 2 5 2000

CRAIG T. SUTTON, personal representative of the estate of) Phil Lombardi, Clerk U.S. DISTRICT COURT
CEDRIC ISCO SUTTON, deceased,)
Plaintiff,	
vs.) Case Number 99-CV0608H (M)
)
CREEK COUNTY BOARD OF)
COUNTY COMMISSIONERS,	
JOHN O'MARA, and FRED CLARK,) ENTERED ON DOCKET
Defendants.	DATE MAY 3 0 2000
Defendants.	A STATE OF THE PARTY OF THE PAR

STIPULATION OF DISMISSAL WITH PREJUDICE

COME NOW the parties of record to the above styled case, Plaintiff Craig T. Sutton, personal representative of the estate of Cedric Isco Sutton and the Defendants Creek County Board of County Commissioners, John O'Mara and Fred Clark, pursuant to Rule 41 (a) (1) Fed. R.Civ P., and stipulate that the above styled case is dismissed with prejudice, each party to bear its own costs and attorneys fees.

Warren Gotcher
Sean McKeating
GOTCHER & BELOTE

209 East Wyandotte Post Office Box 160

McAlester, Oklahoma 74502

ATTORNEYS FOR PLAINTIFF

George S. Corbyn, Jr., OBA No. 1910 Amy J. Pierce, OBA No. 17980 Two Leadership Square, Suite 1120 211 N. Robinson Oklahoma City, Oklahoma 73102

ATTORNEYS FOR DEFENDANTS CREEK COUNTY BOARD OF COUNTY COMMISSIONERS, JOHN O'MARA AND FRED CLARK

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA $_{F\ I\ L\ E\ D}$

ANDRE BUTLER,	MAY 2 6 2000
SSN: 497-56-5504,	Phil Lombardi, Clerk U.S. DISTRICT COURT
PLAINTIFF,)
vs.) Case No. 99-CV-354-M
KENNETH S. APFEL, Commissioner of the Social Security))
Administration,	ENTERED ON DOCKET
Defendant.	DATE MAY 3 0 2000

JUDGMENT

Judgment is hereby entered for Defendant and against Plaintiff. Dated this 26 day of \underline{MAY} , 2000.

FRANK H. McCARTHY
UNITED STATES MAGISTRATE JUDGE

NORTHERN DISTRICT OF OKLAHOMA FILED ANDRE BUTLER, SSN: 497-56-5504, Phil Lombardi, Clerk U.S. DISTRICT COURT VS. CASE NO. 99-CV-354-M KENNETH S. APFEL, Commissioner of the Social Security Administration, DEFENDANT. DEFENDANT.

UNITED STATES DISTRICT COURT FOR THE

ORDER

Plaintiff, Andre Butler, seeks judicial review of a decision of the Commissioner of the Social Security Administration denying Social Security disability benefits.¹ In accordance with 28 U.S.C. § 636(c)(1) & (3) the parties have consented to proceed before a United States Magistrate Judge.

The role of the court in reviewing the decision of the Commissioner under 42 U.S.C. §405(g) is limited to determining whether the decision is supported by substantial evidence and whether the decision contains a sufficient basis to determine that the Commissioner has applied the correct legal standards. *Winfrey v. Chater*, 92 F.3d 1017 (10th Cir. 1996); *Castellano v. Secretary of Health & Human Servs.*, 26 F.3d 1027, 1028 (10th Cir. 1994). Substantial evidence is more than a scintilla, less

Plaintiff's September 22, 1995 application for Disability Insurance benefits was denied initially and upon reconsideration. A hearing before an Administrative Law Judge (ALJ) was held April 30, 1997. By decision dated June 24, 1997, the ALJ entered the findings that are the subject of this appeal. The Appeals Council denied review of the ALJ's decision on March 10, 1999. The action of the Appeals Council represents the Commissioner's final decision for purposes of further appeal. 20 C.F.R. §§ 404.981, 416.1481.

than a preponderance, and is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Richardson v. Perales*, 402 U.S. 389, 401, 91 S.Ct. 1420, 1427, 28 L.Ed.2d 842 (1971) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). The Court may neither reweigh the evidence nor substitute its judgment for that of the Commissioner. *Casias v. Secretary of Health & Human Servs.*, 933 F.2d 799, 800 (10th Cir. 1991). Even if the Court might have reached a different conclusion, if supported by substantial evidence, the Commissioner's decision stands. *Hamilton v. Secretary of Health & Human Services*, 961 F.2d 1495 (10th Cir. 1992).

Plaintiff was born October 13, 1951, and was 45 years old at the time of the hearing. [R. 38, 82]. He claims to have been unable to work since January 1994 due to low back and neck pain, pain in the left leg and headaches. [R. 49, 82, 91].

The ALJ determined that Plaintiff has severe impairments consisting of cervical strain, lumbosacral strain and herniated discs at C6-7, L4-5 and L5-S1. The ALJ concluded that, despite these severe impairments, Plaintiff retains the residual functional capacity (RFC) to perform light work activity with restrictions. Although he determined that Plaintiff could not return to his past relevant work (PRW) as truck driver, engineer's assistant, maintenance worker, warehouse worker, utility light worker and painter, he found that there are other jobs in the economy in significant numbers that Plaintiff could perform with his RFC. He found, therefore, that Plaintiff was not disabled as defined by the Social Security Act. [R. 26]. The case was thus decided at step five of the five-step evaluative sequence for determining whether a

claimant is disabled. *See Williams v. Bowen*, 844 F.2d 748, 750-52 (10th Cir. 1988) (discussing five steps in detail).

Plaintiff asserts the ALJ did not accord appropriate weight to the opinions of his treating physicians and that he erred in citing semi-skilled jobs as alternative jobs Plaintiff could perform with his RFC absent a finding of transferable skills. For the reasons discussed below, the Court affirms the decision of the Commissioner.

The medical portion of the record has been adequately recapped by the ALJ in his decision and the parties in their briefs. The Court, therefore, confines its discussion of the medical record to the physicians' reports in contention.

Plaintiff's First Statement of Error

Plaintiff asserts the finding of the ALJ is contradicted by the medical evidence and inconsistent with the limitations imposed by Plaintiff's treating physicians and those assessed by the DDU examiner.

A treating physician may offer an opinion which reflects a judgment about the nature and severity of the claimant's impairments including the claimant's symptoms, diagnosis and prognosis, and any physical and mental restrictions. See 20 C.F.R. §§ 404.1527(a)(2), 416.927(a)(2). However, while a physician may proffer an opinion regarding the ability of a claimant to work, that opinion is not dispositive because final responsibility for determining the ultimate issue of disability is reserved to the Secretary. See 20 C.F. R. §§ 404.1527(e)(2), 416.927(e)(2); Castellano, 26 F.3d at 1028, Eggleston v. Bowen, 851 F.2d 1244, 1246-7 (10th Cir. 1988). In this case, Plaintiff's treating physicians acknowledged Plaintiff experienced pain and required pain

medication. However, there is no indication that any of them thought he would be unable to do any work. In fact, both of Plaintiff's treating physicians opined that, although he could not return to his PRW, they thought him capable of doing some work. [R. 186, 224, 258]. Plaintiff's complaints center around the restrictions imposed by Lawrence A. Reed, M.D. and John B. Vosburgh, M.D., his treating physicians, which he asserts contradict the RFC assessment reached by the ALJ.

Plaintiff contends the ALJ found "that Mr. Butler could do prolonged standing as long as he could sit for a few minutes every hour." [Plaintiff's Brief]. The actual language used by the ALJ in his decision is: "The Administrative Law Judge finds that the claimant's impairments limit him to light level work activity that does not require repetitive pushing or pulling of arm or leg controls; climbing of ropes, ladders, or scaffolds; vibration affecting back, neck, or arms; repetitive reaching overhead; repetitive extreme rotation, flexion, or extension of the neck; more than occasional stooping, crouching, bending or climbing of ramps or stairs; or more than infrequent crawling. Additionally, the claimant would need to alternate sitting and standing at least once every hour for five to ten minutes." [R. 22]. Thus, the ALJ did not find that Plaintiff was capable of performing the full range of light work, which involves "a

² The additional requirement regarding alternate sitting and standing is not included in Finding No. 7 of the ALJ's decision. [R. 27]. However, because it is included within the ALJ's discussion of Plaintiff's RFC in the body of his decision and because it is also included in the ALJ's second hypothetical to the Vocational Expert, upon whose response he relied in citing jobs available that Plaintiff could perform, the Court finds the exclusion of the additional requirement in the ALJ's Finding 7 is harmless.

good deal of walking or standing"³ but rather, determined Plaintiff's RFC allowed him to perform light and sedentary work that did not require performance of activities precluded by his impairments, including prolonged standing. *Id.* There is support for this finding in the record.

Dr. Vosburgh released Plaintiff from his care on July 6, 1994. [R. 185-186]. He recommended Plaintiff seek work that does not require frequent bending, stooping and lifting, no lifting over 20 pounds and work that "would permit him to sit about 50 percent of his work day." [R. 186]. Dr. Reed released Plaintiff to return to work on July 15, 1994, and concurred with the work restrictions recommended by Dr. Vosburgh. No mention was made of walking and/or standing limitations. [R. 224]. Dr. Reed's "addendum" report of September 8, 1995, repeated those restrictions, again with no mention of any walking and/or standing limitations. [R. 257]. The focus of both doctors was upon Plaintiff's inability to do his past jobs which were in the medium and heavy exertional levels. [R. 71].

At the hearing, the ALJ presented the Vocational Expert (VE) with a hypothetical which set forth exertional limitations that did not include any standing, walking or sitting restrictions, to which the VE responded that there were several light and sedentary jobs available. [R. 72-73]. The ALJ then included the requirement of "a sit/stand option every one hour with a brief change of position five or ten minutes or so" in his second hypothetical to the VE. [R. 73]. The VE responded that the unskilled

³ 20 C.F.R. §404.1567(b).

office cleaner and assembly jobs would be eliminated but the order clerk and the stock clerk jobs would not be affected "too significantly." [R. 74]. The VE was then presented with the RFC evaluation form prepared by the medical examiner for the Disability Determination Unit of the Social Security Administration, Varsha Sikka, M.D., on December 23, 1996. [R. 74-75, 270-272]. Using Dr. Sikka's RFC as a guide, the VE identified the order clerk and assembly work as jobs still available that Plaintiff could perform. [R. 75]. The VE was then presented with the RFC form prepared by Dr. Reed, Plaintiff's treating physician, on October 4, 1996. [R. 75, 260-262]. A discussion ensued between the ALJ and the VE about the standing, walking and sitting restrictions imposed by Dr. Reed in his RFC as follows:

A His [Dr. Reed's] RFC indicates the person can stand an hour at a time, walk an hour at a time, stand only three hours in an eight-hour day and walk only three hours in an eight-hour day. Can sit for one hour at a time, but only three hours in an eight-hour day. With those limitations, of course, the standing and walking would eliminate light work and the sitting, he's not able to sit at least six hours in an eight-hour day would eliminate any sedentary work. So with those limitations, it would eliminate all sedentary and light jobs.

Q Okay. Even though the person can do eight hours' worth of sitting, standing, and walking -- this sounds like something between sedentary and light almost.

A Okay.

I'm just curious as to whether somebody can actually do sit three hours total, stand three hours total and walk three hours total in a day. That's nine hours in an eight-hour day. Is there any kind of work that can be done with that kind of situation?

A Well, I think that there is work that can be done with that situation, but there's probably the semiskilled or skilled work that allows the person pretty much to choose their own schedule and how to perform the job themselves in order to accommodate their limitations in sitting, standing and walking.

Q But vocationally, that's why really you're called is to see if you can identify jobs that can be done.

A I understand what you're saying. I'm just saying that most, most sedentary jobs would require him to be able to sit the whole six hours out of an eight-hour day. Standing and walking, he'd be required to stand and/or walk. I think those are combined activities because he's going to be doing both in a light job. Again, he'd have to be able to do those activities six hours out of an eight-hour day.

The reason I'm asking, it seems if somebody can stand three hours and walk three hours then that's six hours and that would seem to be the definition of light. And he can also sit three hours so at least it seems like they can do --

A Light work.

- Q -- light work.
- A Okay. Well, I guess with your definition they could do light work.
- Q Can you identify jobs that are light that could be done with that RFC?

A Standing and walking, if he could do that? Well, the office cleaner. He could perform that job. He could perform the stock clerk, file clerk.

[R. 75-77].

The ALJ is charged to interpret the facts and medical evidence and reach a conclusion regarding Plaintiff's RFC. *Castellano*, 26 F.3d at 1029. See also *Kemp v. Bowen*, 816 F.2d 1469, 1476 (10th Cir.1987) (noting it is fact finder's responsibility to resolve genuine conflicts between opinion of treating physician and other contrary evidence). In this case, the ALJ had before him all the records and reports of treating and examining physicians in assessing Plaintiff's RFC. The Court finds the opinions of Plaintiff's treating physician and the DDU examiner do not contradict the ultimate conclusion of the ALJ as to Plaintiff's ability to perform the jobs identified by the VE. The ALJ obviously allowed for the standing and sitting limitations recommended by Plaintiff's physicians in his assessment of Plaintiff's RFC. The ALJ demonstrated that he was fully aware of the standing and sitting limitations required for Plaintiff to be able to work as evidenced by his adoption of the jobs identified by the VE that would accommodate such restrictions. The Court finds the ALJ accorded appropriate weight to the reports and opinions of Plaintiff's treating physicians.

The ALJ listed light, semiskilled store clerk (23,000 regionally and 184,000 nationally); sedentary semiskilled order clerk (13,000 regionally and 104,000 nationally); and light, semiskilled file clerk (17,000 regionally and 137,000 nationally) as examples of jobs existing in significant number in the economy that Plaintiff could perform in his decision denying benefits. Testimony elicited from the VE by Plaintiff's attorney at the hearing verifies the determination by the ALJ that there are jobs available in significant numbers in the economy that Plaintiff can perform with his RFC. The attorney representing Plaintiff presented the VE with the report written by Dr. Vosburgh, Plaintiff's treating physician, on July 6, 1994. [R. 78, 185-186]. She questioned the VE about a job which "would be actually sitting for half the time, standing for half the time." [R. 78]. To this, the VE responded that the stock clerk and file clerk jobs could accommodate such a requirement. [R. 79]. The Court finds there is sufficient evidence in the record to support the determination that Plaintiff is not disabled under the Social Security Act.

Plaintiff's Second Statement of Error

Plaintiff contends the ALJ erred in relying upon semi-skilled jobs as alternative jobs he could perform absent a finding of transferable skills.⁴ Plaintiff asserts Soc. Sec. Rule 83-10 instructs that a person without transferable skills cannot be expected

⁴ In the response brief submitted by Defendant's counsel, this second allegation of error was not addressed. It is not clear whether Defendant means to confess this issue or simply overlooked it. Nonetheless, even without benefit of Defendant's argument in his own behalf, the Court finds Plaintiff's contention is without merit.

to perform skilled or semi-skilled work. The Court does not find authority for Plaintiff's position in this rule.

Because of Plaintiff's exertional limitations, the starting point for the analysis is the grid for light work. This grid directs a finding of not disabled for Plaintiff because he is a "younger individual", ⁵ a high school graduate or more⁶ who has done unskilled work. 20 C.F.R., Pt. 404, Subpt. P, App. 2, Rule 202.20 (grids). This finding under the grid reflects an administrative evaluation that the full range of approximately 1,600 sedentary and light occupations constitutes a significant number of jobs for vocational adjustment to be possible for someone of the same age, education and work experience as Plaintiff. However, because Plaintiff has nonexertional impairments, the full range of light occupations is not available in determining whether he can make a vocational adjustment to other work. The Commissioner's instructional ruling, S.S.R. 83-10, (1983 WL 31251 *4) instructs that "[t]he issue of whether a work adjustment is possible involves a determination as to whether the jobs whose requirements can be met provide an opportunity for adjusting to substantial and gainful work other than that previously performed. Accordingly, the issue of work adjustment is determined based on the interaction of the work capability represented by RFC (the remaining

⁵ A claimant between the ages of 18 and 49 is a "younger individual" for purposes of Social Security disability. 20 C.F.R. 1563. Plaintiff was born October 13, 1951, making him 45 years of age on the date of the hearing, 48 years of age as of this writing. [R. 82, 91].

⁶ Plaintiff had approximately two years of college, [R. 33], and six months of vo-tech training, [R. 34], after obtaining his GED, [R. 38-39].

occupational base) with the other factors affecting capability for adjustment -- age, education, and work experience."

In this case, the ALJ consulted a vocational expert (VE) at the hearing. The VE was present during Plaintiff's testimony regarding his age, education and work experience. [R. 37]. After the VE's testimony described above, the Plaintiff's attorney questioned the VE about the reduction in numbers of the jobs described by her as available to Plaintiff with the sitting restrictions. The VE indicated the order clerk, file clerk or stock clerk jobs would be reduced by 50 percent. The following exchange then took place between Plaintiff's attorney and the VE:

- Q Okay. And in your opinion would these be using skills that the claimant has already transferred.
- A No.
- Q He does not have the transferable skills to perform either order clerk or file clerk?
- A No.
- Q Okay.

ATTY: That's all the questions I have.

[R. 79-80]. Thereupon, the ALJ re-examined the VE:

- Q Would the claimant based on his education be able to perform these jobs?
- A From his junior college, yes.

[R. 80].

The ALJ clearly considered these factors (RFC, age, education and work experience) both when he applied the guidelines initially [R. 27, Finding No. 11], and as a framework when he considered the testimony of the vocational expert [R. 27, Finding No. 12]. By relying upon the response of the VE, the ALJ complied with Social Security Ruling 83-12: "Where the extent of the erosion of the occupational base is not clear, the adjudicator will need to consult a vocation resource." The testimony of a vocational expert can constitute substantial evidence to support a conclusion that a claimant is not disabled. See *Talley v. Sullivan*, 908 F.2d 585, 588 (10th Cir. 1990).

Conclusion

The Court finds that the ALJ evaluated the record in accordance with the correct legal standards established by the Commissioner and the courts. The Court finds that there is substantial evidence in the record to support the ALJ's decision. Accordingly, the decision of the Commissioner finding Plaintiff not disabled is AFFIRMED.

Dated this 24 day of MRY , 2000.

FRANK H. McCARTHY

UNITED STATES MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

JOHN COLLINS,) MAY 2 6 2008 7
Plaintiff,) Phil Lombardi, Clerk U.S. DISTRICT COURT
v.) Case No. 99-CV-900-M
KENNETH S. APFEL, Commissioner,) }
Social Security Administration,) ENTERED ON DOCKET
Defendant.	DATE MAY 30 200

JUDGMENT

This action has come before the Court for consideration upon an unopposed Motion to Reverse and Remand for Further Administrative Action.

An Order reversing and remanding the case to the Commissioner has been entered.

Judgment for Plaintiff and against Defendant is hereby entered pursuant to the Court's Order and in accordance with Fed. R. Civ. P. 58.

THUS DONE AND SIGNED on this 26 day of may 2000.

FRANK H. McCARTHY

United States Magistrate Judge

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA **F I L E D**

JOHN COLLINS,	MAY 2 6 2008
Plaintiff,	Phil Lombardi, Clerk U.S. DISTRICT COURT
v.) Case No. 99-CV-900-M
KENNETH S. APFEL,) }
Commissioner,) ENTERED ON DOCKET
Social Security Administration,	
Defendant.) DATE MAY 3 0 2000

ORDER

Upon the unopposed motion of Defendant, Commissioner of the Social Security Administration, by Stephen C. Lewis, United States Attorney of the Northern District of Oklahoma, through Cicely S. Jefferson, Special Assistant United States Attorney, it is hereby ORDERED that this case be reversed and remanded to the Commissioner for further administrative action pursuant to sentence four (4) of § 205(g) of the Social Security Act, 42 U.S.C. § 405(g). *Melkonyan v. Sullivan*, 501 U.S. 89 (1991).

THUS DONE AND SIGNED on this 28 Hday of MAT 2000.

FRANK H. McCARTHY
United States Magistrate Judge

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

	MAY 2 6 2000	A
CHARLES R. WYATT,	Philipple	7
SSN: 445-35-3988,	Phil Lombardi, Cler U.S. DISTRICT COU	k R1
DI ' 4°CC)	
Plaintiff,)	
)	
v.) Case No. 99-CV-0759-EA	
)	
KENNETH S. APFEL, Commissioner,)	
Social Security Administration,	,)	
) ENTERED ON DOCKET	
Defendant.	THE OIL BOOKET	
	DATE MAY 3 0 2000	

JUDGMENT

This action has come before the Court for consideration and an Order remanding the case to the Commissioner has been entered. Judgment for the Plaintiff and against the Defendant is hereby entered pursuant to the Court's Order.

It is so ORDERED this 26 day of May, 2000.

Claire Y Ea CLAIRE V. EAGAN

UNITED STATES MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA FILED

MAY 2 6 2000
Phil Lombardi, Clerk U.S. DISTRICT COURT
) Civil Case No. 99-CV-759-EA
))
· ·
ENTERED ON DOCKET MAY 3 0 2000
DATE

ORDER

Upon the unopposed motion of Defendant, Commissioner of the Social Security Administration, by Stephen C. Lewis, United States Attorney of the Northern District of Oklahoma, through Una McGeehan, Special Assistant United States Attorney, it is hereby ORDERED that this case be reversed and remanded to the Commissioner for further administrative action pursuant to sentence four (4) of § 205(g) of the Social Security Act, 42 U.S.C. § 405(g). Melkonyan v. Sullivan, 501 U.S. 89 (1991).

THUS DONE AND SIGNED on this 26 day of May 2000.

United States Magistrate Judge

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

SILVERADO FOODS, INC., an Oklahoma corporation,	ENTERED ON DOCKE
Plaintiff,	DATE MAY 3 0 2000
vs.) No. 99-CV-0118-H (E)
GOURMET SPECIALTY BAKERS, INC., a California corporation,)))
Defendant/Third-Party Plaintiff,))
vs.	
LAWRENCE FIELD, an individual, and IRA HERMANN, an individual,	MAY 26 2200
Third-Party Defendants.	

JUDGMENT

JUDGMENT IS HEREBY ENTERED in favor of the Plaintiff and against the Defendant on the Complaint, for the sum of \$485,000.00, plus interest thereon from and after September 3, 1999, on all unpaid sums, at the rate of twelve percent (12%) per annum until paid, for all of which let execution issue immediately.

IT IS FURTHER ORDERED that the Plaintiff is entitled to the immediate possession of the personal property described on Exhibit A (the "Collateral") as against the Defendant. The Plaintiff is entitled to an order for delivery, without bond, directing the U.S. Marshal in California to take possession of the Collateral and deliver possession to Silverado. The Court determines that the Plaintiff is authorized to exercise the rights of a secured creditor pursuant to Article Nine of the Uniform Commercial Code as adopted in the jurisdiction where the collateral is located (the "UCC") with respect to the Collateral, which rights include, but are not limited to, the rights to prepare the

Collateral for sale, to sell the Collateral and to apply the proceeds of any such disposition in accordance with the UCC; that the Plaintiff is authorized to sell the Collateral by private or public sale without any notice to the Defendants or their counsel; and to apply the proceeds of sale upon the indebtedness due and owing Plaintiff by the Defendants as a credit against the money judgment awarded hereby; that if a surplus is realized the Plaintiff shall pay the same to the Defendant, or if a deficiency remains, the Plaintiff may proceed, as with any other money judgment, to seek collection thereof.

JUDGMENT IS ALSO HEREBY ENTERED in favor of the Plaintiff and Third Party Defendant Lawrence Field and against the Defendant on the Answer, Counterclaim, and Third-Party Petition filed by Defendant on March 19, 1999, and that Defendant shall take and recover nothing from Plaintiff or Lawrence Field.

THE COURT HEREBY DETERMINES that there is no just reason for delay and expressly directs the entry of this judgment herein.

DATED: The 26 day of MAY

HØN. SVEN ERIK HOLMES

UNITED STATES DISTRICT JUDGE

Submitted by:

Andrew R. Turner (OBA No. 9125)

of

CONNER & WINTERS, A Professional Corporation 3700 First Place Tower 15 East Fifth Street, Suite 3700 Tulsa, Oklahoma 74103-4344

(918) 586–5711; fax (918) 599–9404

Attorney for Plaintiff
SILVERADO FOODS, INC. and
Third-Party Defendant LAWRENCE FIELD

Approved as to form;

Tony M Graham (OBA No. 3524)

Feldman, Franden, Woodard & Farris 525 S. Main, Suite 1000 Tulsa, Oklahoma 74103-4514

(019) 592 7120. ((019) 594 29

(918) 583-7129; fax (918) 584-3814

Attorney for Defendant and

Third-Party Plaintiff GOURMET SPECIALTY BAKERS, INC.

WILLIAM J. LYONS Phil Lo. U.S. DIS Plaintiff, V. Case No. 99-CV-0616-B (M. DEPARTMENT OF LABOR, ALEXIS M. HERMAN, SECRETARY, in her official capacity, THOMAS O. BOULS., Regional		E	D
DEPARTMENT OF LABOR, ALEXIS M.) HERMAN, SECRETARY, in her official) capacity, THOMAS O. BOULS., Regional)	26 mbard TRICT		
HERMAN, SECRETARY, in her official) capacity, THOMAS O. BOULS., Regional)) /	/	
Director, in his official capacity, KENNETH BARBER, Claims Examiner, in his official capacity, THOMAS A. TERRILL, Hearing Representative, in his official capacity, EUGENE HENDRIX, Senior Claims Examiner, in his official capacity, DATE	DOC 3 0	20(ָם
Defendants.			

Before the Court is the Motion for Summary Judgment filed by Defendants, Department of Labor and the following individuals in their official capacities as employees of the Department of Labor: Alexis M. Herman, Thomas O. Bouls, Kenneth Barber, Thomas A. Terrill, and Eugene Hendrix (collectively referred to as "DOL") (Docket No. 13). Plaintiff William J. Lyons ("Lyons"), a former part-time mail carrier for the United States Post Office in Tulsa, Oklahoma, sustained injuries as a result of being struck by a private vehicle during his employment. He was awarded benefits under the Federal Employees Compensation Act ("FECA") for those injuries until the benefits were terminated based on the report of Dr. Randall Hendricks. As a result of Lyon's appeal of the termination, his benefits were reinstated pending a final report by Dr. Hendricks. Lyons filed this action complaining the DOL had violated its procedures and his right to due process by requiring Lyons to be examined by Dr. Hendricks and failed to respond adequately to his requests for

<u>ORDER</u>

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information under the Freedom of Information Act ("FOIA") and the Privacy Act, thereby causing him emotional distress and further physical injury.

On September 23, 1999, the DOL filed a motion to dismiss the action for failure to state a claim pursuant to Fed.R.Civ.P. 12(b)(6) and lack of subject matter jurisdiction pursuant to Fed.R.Civ.P. 12(b)(1). As both parties relied on materials outside the pleadings, the Court converted the motion to dismiss to a motion for summary judgment. *Miller v. Glanz*, 948 F.2d 1562, 1565 (10th Cir. 1991)("if matters outside of the complaint are presented to and not excluded by the court, then the court should treat the motion as one for summary judgment under Rule 56 and not as a motion to dismiss"). The Court directed the DOL to file a separate brief in support of summary judgment within twenty (20) days and Lyons to file his response within fifteen (15) days thereafter. On February 18, 2000, the DOL timely filed this motion for summary judgment. To date, Lyons has failed to file a response.

Summary judgment pursuant to Fed.R.Civ.P. 56 is appropriate where "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986); Windon Third Oil & Gas v. FDIC, 805 F.2d 342, 345 (10th Cir. 1986). In Celotex, the Supreme Court stated:

[t]he plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against

¹Specifically, the DOL contended the decision regarding FECA benefits is not reviewable by this Court as Lyons' administrative remedy is exclusive under 5 U.S.C. §8128(b); Lyons failed to exhaust his administrative remedies under the FOIA and the Privacy Act, as well as the Federal Tort Claims Act ("FTCA"); and Lyons failed to state a claim for violation of due process. In support of its motion, the DOL relied on the affidavits of Jane McHam and Mary Schopmeyer as well as correspondence between the DOL and Lyons. In response, Lyons did not address the issues raised by the DOL other than to continue to request DOL's "operating manual" under the FOIA and state he is not making a claim under the FTCA. Lyons cited additional correspondence between the DOL and Lyons in support.

a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.

477 U.S. at 322.

A party opposing a properly supported motion for summary judgment must offer evidence, in admissible form, of specific facts sufficient to raise a "genuine issue of material fact." *Anderson*, 477 U.S. at 247-48.

The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff.

Id. at 252. Thus, to defeat a summary judgment motion, the nonmovant "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita v. Zenith*, 475 U.S. 574, 585 (1986).

In essence, the inquiry for the Court is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson*, 477 U.S. at 250. In its review, the Court must construe the evidence and inferences therefrom in a light most favorable to the nonmoving party. *Committee for the First Amendment v. Campbell*, 962 F.2d 1517, 1521 (10th Cir. 1992).

As Lyons has failed to respond to the motion for summary judgment, the following statement of facts is undisputed.

Lyons was a part-time city mail carrier with the U.S. Postal Service. On May 7, 1984, he sustained injuries when his mail truck was struck by another vehicle. The Office of Workers Compensation Programs ("OWCP") accepted Lyons' claim for compensation for cervical and lumbar strain. He was awarded FECA benefits for those injuries until the benefits were terminated on January 14, 1999 based on Dr. Hendricks' report. In his report, Dr. Hendricks opined that Lyons

had recovered without any residual effect from his work-related injury. Lyons appealed the decision and on June 14, 1999, the DOL reinstated Lyons' benefits and authorized the District Director to arrange for additional testing and a final report by Dr. Hendricks. The District Office made an appointment for Lyons to see Dr. Hendricks on August 2, 1999. Although he appealed the initial termination of benefits, Lyons did not file an administrative appeal of DOL's request that he submit to further medical examination by Dr. Hendricks.

By letter dated July 12, 1999, Lyons reiterated a request under the FOIA for copies of all his records, including administrative, medical, telephone logs, e-mail, interoffice/intraoffice and attorney correspondence, rulings, status reports, memos, mailings, investigations, logs and notes. OWCP Claims Manager, Jane McHam ("McHam"), responded by letter dated July 19, 1999, informing Lyons a copy of his entire file would be sent to him shortly and the pertinent regulations and rules were available at public libraries and over the Internet. On July 27, 1999, the OWCP mailed Lyons a copy of his entire file. There is no record that Lyons filed an administrative appeal of this action under the FOIA.

On July 28, 1999, Lyons filed this action. Although the legal bases for his claims are unclear from the Complaint, it appears he is seeking relief under FECA, FOIA and the Privacy Act.²

The DOL moves for summary judgment based on lack of jurisdiction over Lyons' FECA claim and Lyons' failure to exhaust his administrative remedies under the FOIA. The Court grants the motion.

Under the FECA statutory scheme, the Secretary of Labor is authorized to administer and prescribe rules and regulations for the administration and enforcement of the Act. 5 U.S.C. §§8145 and 8149. The Secretary delegated this authority to the OWCP which must establish that the weight

²As noted above, Lyons stated he was not making a claim under the FTCA.

of evidence shows the said disability has ceased before terminating or reducing compensation. 20 C.F.R. §10.503. If the claimant is aggrieved by OWCP's final determination, the Act provides the following procedures for administrative review of the decision: (1) reconsideration by the district office; (2) hearing before the OWCP hearing representative; or (3) appeal with the Employees' Compensation Appeals Board ("ECAB"). 20 C.F.R. §10.600.

Section 8128(b) of FECA expressly precludes judicial review of an administrative determination:

- (b) The action of the Secretary or his designee in allowing or denying a payment under this subchapter is -
 - (1) final and conclusive for all purposes and with respect to all questions of law or fact; and
 - (2) not subject to review by another official of the United States or by a court by mandamus or otherwise.

5 U.S.C. §8128(b). Lindahl v. Office of Personnel Management, 470 U.S. 768, 779-80 n.13 (1985)(The "unambiguous and comprehensive language" of this preclusion-of-review statute expresses Congress's intention "to bar judicial review altogether."). However, courts have recognized a limited exception to the statutory bar on judicial review when the claim involves a substantial, cognizable constitutional violation. See e.g., Czerkies v. United States Dep't of Labor, 73 F.3d 1435, 1438 (7th Cir. 1996)(en banc); Staacke v. U.S. Secretary of Labor, 841 F.2d 278, 281 (9th Cir. 1988); Paluca v. Secretary of Labor, 813 F.2d 524, 526-27 (1st Cir.), cert. denied, 484 U.S. 943 (1987).

Lyons asserts the DOL violated his right to due process and exceeded its statutory authority in scheduling a further medical examination by Dr. Hendricks. Specifically, Lyons claims he should have been given a choice of three doctors as required by Chapter 3-500, Paragraph 4 of Part 3 of the DOL procedural manual, and Dr. Hendricks was not qualified to render a medical opinion.

A due process violation does not occur when a plaintiff has ample notice and opportunity to be heard. Based on the undisputed facts. Lyons did not pursue any of the administrative avenues under FECA to appeal DOL's request that he submit to further medical examination by Dr. Hendricks. As Lyons had sufficient notice and opportunity to be heard through administrative appeals, there has been no constitutional deprivation. *See Soeken v. Herman*, 35 F. Supp. 2d 99, 105 (D.C. 1999). Accordingly, the exception to the statutory bar of judicial review under §8128(b) is inapplicable and the Court lacks jurisdiction over Lyon's claim under FECA.

The Court also grants the DOL's motion for summary judgment on Lyon's FOIA and Privacy Act claims as it is undisputed that the OWCP mailed Lyon a copy of his complete file and that he failed to file any appeal of the OWCP's response to his FOIA request. Failure to exhaust administrative remedies under the FOIA requires dismissal of his claim. *Taylor v. Appleton*, 30 F.3d 1365,1367 (11th Cir. 1994); *Barvick v. Cisneros*, 941 F. Supp. 1015, 1018 n.3 (D. Kan. 1996).

For the reasons stated above, the DOL's motion for summary judgment is granted. (Docket #13).

IT IS SO ORDERED, this 26 day of May, 2000.

THOMAS R. BRETT

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

F	I	\mathbf{L}	E	D
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MAY 2 6 2000

WILLIAM J. LYONS) Phil Lombardi, Clerk U.S. DISTRICT COURT
Plaintiff,	
V.	Case No. 99-CV-0616-B (M)
DEPARTMENT OF LABOR, ALEXIS M.)
HERMAN, SECRETARY, in her official)
capacity, THOMAS O. BOULS., Regional	
Director, in his official capacity, KENNETH)
BARBER, Claims Examiner, in his official)
capacity, THOMAS A. TERRILL, Hearing)
Representative, in his official capacity,) ENTERED ON DOCKET
EUGENE HENDRIX, Senior Claims Examiner,	MAY 3 0 2000
in his official capacity,	DATE THE TOTAL PORTION
Defendants.)

JUDGMENT

In accord with the Order filed this date sustaining the Defendants' Motion for Summary Judgment, the Court hereby enters judgment in favor of the Defendants, Department of Labor and the following individuals in their official capacities as employees of the Department of Labor: Alexis M. Herman, Thomas O. Bouls, Kenneth Barber, Thomas A. Terrill, and Eugene Hendrix, and against the Plaintiff, William J. Lyons. Costs are assessed against the Plaintiff, if timely applied for under N. D. Local Rule 54.1. Each party is to pay its respective attorney's fees.

Dated this 2 day of May, 2000.

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

F I L E D

MAY 2 6 2000

Phil Lombardi, Clerk U.S. DISTRICT COURT

PALACE EXPLORATION COMPANY,	U.S. DISTRICT COURT
Plaintiff,))
v.) Case No. 98-C-890-B(J)
PETROLEUM DEVELOPMENT COMPANY,)) ENT
Defendant.	ENTERED ON DOCKET

ORDER AND JUDGMENT

Upon review of the Stipulation of Dismissal with Prejudice, the Court finds that this matter is finally resolved, all claims by both parties having been adjudicated or dismissed with prejudice. This Order and Judgment shall be considered final for purposes of appeal.

IT IS SO ORDERED this 26 tay of May, 2000.

THOMAS R. BRETT

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

MAY 2 5 2000

NIVA G. CONGO,) Phil Lombardi, Clerk) U.S. DISTRICT COURT
PLAINTIFF,	}
vs.) Case No. 99-CV-332-M
UNITED STATES OF AMERICA,	ENTERED ON DOCKET
DEFENDANT.	DATE MAY 2 6 2000

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter was tried to the Court without a jury on May 22 and May 23, 2000. The parties consented to trial before a United States Magistrate Judge. 28 U.S.C. § 636(c)(3). Pursuant to Fed. R. Civ. P. 52, the Court hereby makes its Findings of Fact and Conclusions of Law.

Findings of Fact

- On September 10, 1996, Plaintiff, Niva G. Congo, was entering the United States Post Office located at 9023 East 46th Street in Tulsa, Oklahoma, when she fell on a floor mat inside the entry door.
- The mat was placed on the floor inside the entry door by the Defendant to prevent the tracking of soil, dirt, water, etc., into the building.
- As Plaintiff entered the building, nothing obstructed her view of the floor mat.
- 4. Plaintiff did not look at the floor mat prior to falling.



- 5. As a routine practice, the Defendant inspected the floor mat on a daily basis to determine if it was worn or needed to be replaced. These inspections never revealed the floor mat to be worn or needing replacement.
- 6. Between 1994 and 1998, the same floor mat was in use and there were no other reports of anyone falling on the floor mat.
- Plaintiff has fallen numerous times before and after her fall on September
 10, 1996.
- People with medical conditions such as Plaintiff's, including back and knee problems and diabetes, may have difficulty feeling their feet and walking.
- Plaintiff's various medical conditions existing prior to September 10,
 1996, may have caused her to fall on September 10, 1996, and on other occasions.
- 10. The floor mat shown in Plaintiff's Exhibits Nos. 1, 2 and 3, and also shown in Government's Exhibit No. 3, is the floor mat Plaintiff fell on.
- On September 10, 1996, the floor mat was in good condition without defects.
- Any Finding of Fact which is more properly a Conclusion of Law is deemed a Conclusion of Law.

Conclusions of Law

- The Court has subject matter and personal jurisdiction. Plaintiff's claim was properly filed under the Federal Tort Claims Act (FTCA), 28 U.S.C.
 §§ 1346(b), 2674. Venue is proper. 28 U.S.C. § 1402(b).
- 2. Although federal law controls procedural aspects of this FTCA lawsuit, liability is to be determined by reference to state tort law. *Franklin v. United States*, 992 F.2d 1492, 1495 (10th Cir. 1993); 28 U.S.C. §§ 1346(b), 2674. Under Oklahoma law, Plaintiff must prove by a preponderance of the evidence, the following elements to establish a *prima facie* case of negligence: "(1) a duty owed by the defendant to protect the plaintiff from injury, (2) a failure to properly exercise or perform that duty, and (3) the plaintiff's injuries are proximately caused by defendant's failure to exercise his duty of care." *Henry v. Merck and Co., Inc.*, 877 F.2d 1489, 1491 (10th Cir. 1989).
- 3. Plaintiff was an invitee of Defendant on September 10, 1996, at the time of her fall. As such, Defendant owed Plaintiff a duty to keep the Post Office in a reasonably safe condition and to warn Plaintiff of dangerous conditions which are in the nature of hidden dangers, traps, snares, pitfalls and the like. Rogers v. Hennessee, 602 P.2d 1033, 1034 (Okla. 1979).
- 4. The premises owner or occupant is not liable for injury to an invitee resulting from a danger which was obvious or should have been observed

in the exercise of ordinary care. Williams v. Tulsa Motels, 958 P.2d 1282, 1284 (Okla. 1998).

- 5. The condition of the floor mat was reasonably safe, open and obvious.
- 6. The floor mat upon which Plaintiff fell was not a dangerous condition of which Defendant was required to give warning. Nor did the floor mat have a deceptively innocent appearance of safety which cloaks a reality of danger.
- 7. Defendant was not negligent.
- Plaintiff may not recover from Defendant for her fall on September 10,
 1996.
- Any Conclusion of Law which is more properly a Finding of Fact is deemed to be a Finding of Fact.

DATED this 25 day of May, 2000.

FRANK H. McCARTHY UNITED STATES MAGISTRATE JUDGE

+ 111 	TRICT COURT FOR THE RICT OF OKLAHOMA	F I L E D MAY 24 2000
NIVA G. CONGO,)	Phil Lombardi, Clerk U.S. DISTRICT COURT
PLAINTIFF,	}	/
vs.) Case No. 99-CV-332-M (FILEI
UNITED STATES OF AMERICA,	ENTERED ON DOCKET	MAY 2 5 2000 (
DEFENDANT.	DATE MAY 2 6 2000	Phil Lombardi, Clerk U.S. DISTRICT COURT
JUD	GMENT	
Judgment is hereby entered fo	r Defendant and against Pla	intiff. Dated
this <u>25</u> day of <u>MAY</u> , 200	0.	

FRANK H. McCARTHY
UNITED STATES MAGISTRATE JUDGE

9

UNITED STATE DISTRICT COURT NORTHERN DISTRICT OF OKLAHOMA

	ENTERED ON DOCKE
NORMAN HOLT,	DATE MAY 2 6 2000
Plaintiff,	}
vs.) Case No. CV-98-600-H(M)
PRUDENTIAL HEALTH CARE PLAN, INC.,	MAY 26 2000
Defendant.	

ADMINISTRATIVE CLOSURE ORDER

Plaintiff having filed an unopposed application to continue the administrative closing of this action until July 24, 2000, it is hereby ordered that the Clerk continue the administrative termination of this action in his records, without prejudice to the rights of the parties to reopen the proceedings for good cause shown for the entry of any stipulations or order, or for any other purpose required to obtain a final determination of the litigation.

The parties are order to notify the Court on or before July 24, 2000, as to whether this matter should be reopened or dismissed with prejudice, failure of which shall result in this case being deemed dismissed with prejudice.

IT IS SO ORDERED.

This day of May, 2000.

Sven Erik Holmes

United States District Judge



IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

Phil Lombardi, Clerk U.S. DISTRICT COURT

)
) Case No. 98-C-890-B(J)
)
ENTERED ON DOCKET

STIPULATION OF DISMISSAL WITH PREJUDICEDATE MAY 26 2000

On December 9, 1999, an Order and Judgment, not final for purposes of appeal, was entered in favor of Defendant Petroleum Development Company and against plaintiff Palace Exploration Company on Plaintiff's rescission claims. On May 17, 2000, an Order was entered overruling Plaintiff's Motion for Reconsideration concerning the breach of contract claim in reference to the well relocation and setting forth a schedule for trial of all remaining issues.

Pursuant to Fed. R. Civ. Pro. 41, Plaintiff and Defendant hereby stipulate to the dismissal with prejudice of all remaining claims, and further request that this Court enter an Order and Judgment finally resolving this action.

Fred M. Buxton, OBA #12234

HALL, ESTILL, HARDWICK, GABLE,

GOLDEN & NELSON, P.C.

320 South Boston Avenue, Suite 400

Tulsa, Oklahoma 74103-3708

918/594-0400

Tulsa, Oklahoma 74103-4218

Randali G. Vaughan, OBA #/

WILLIAMSON & MARLAR

PRAY, WALKER, JACKMAN.

918/581-5500

900 ONEOK Plaza

100 West Fifth Street

ATTORNEYS FOR PLAINTIFF

ATTORNEYS FOR DEFENDANT

155793v1 710142 01620

473.7 — 4	RICT COURT FOR THE CT OF OKLAHOMA	F I L E D MAY 24 2000
NIVA G. CONGO,))	Phil Lombardi, Clerk
PLAINTIFF,))	/
vs.)) Case No. 99-CV-332-M	FILED
UNITED STATES OF AMERICA,	ENTERED ON DOCKET	MAY 2 5 2000 (
Defendant.	MAY 2 6 2000	Phil Lombardi, Clerk u.s. DISTRICT COURT
<u>JŲDG</u>	MENT	

Judgment is hereby entered for Defendant and against Plaintiff. Dated this _25¹ day of ______, 2000.

FRANK H. McCARTHY
UNITED STATES MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

MAY 2 5 2000

NIVA G. CONGO,) Phil Lombardi, Clerk) U.S. DISTRICT COURT
PLAINTIFF,	
vs.) Case No. 99-CV-332-M
UNITED STATES OF AMERICA,	ENTERED ON DOCKET
DEFENDANT.	DATE MAY 2 6 2000

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter was tried to the Court without a jury on May 22 and May 23, 2000. The parties consented to trial before a United States Magistrate Judge. 28 U.S.C. § 636(c)(3). Pursuant to Fed. R. Civ. P. 52, the Court hereby makes its Findings of Fact and Conclusions of Law.

Findings of Fact

- On September 10, 1996, Plaintiff, Niva G. Congo, was entering the United States Post Office located at 9023 East 46th Street in Tulsa, Oklahoma, when she fell on a floor mat inside the entry door.
- 2. The mat was placed on the floor inside the entry door by the Defendant to prevent the tracking of soil, dirt, water, etc., into the building.
- As Plaintiff entered the building, nothing obstructed her view of the floor mat.
- 4. Plaintiff did not look at the floor mat prior to falling.



- 5. As a routine practice, the Defendant inspected the floor mat on a daily basis to determine if it was worn or needed to be replaced. These inspections never revealed the floor mat to be worn or needing replacement.
- 6. Between 1994 and 1998, the same floor mat was in use and there were no other reports of anyone falling on the floor mat.
- Plaintiff has fallen numerous times before and after her fall on September
 10, 1996.
- 8. People with medical conditions such as Plaintiff's, including back and knee problems and diabetes, may have difficulty feeling their feet and walking.
- Plaintiff's various medical conditions existing prior to September 10, 1996, may have caused her to fall on September 10, 1996, and on other occasions.
- 10. The floor mat shown in Plaintiff's Exhibits Nos. 1, 2 and 3, and also shown in Government's Exhibit No. 3, is the floor mat Plaintiff fell on.
- 11. On September 10, 1996, the floor mat was in good condition without defects.
- Any Finding of Fact which is more properly a Conclusion of Law is deemed a Conclusion of Law.

Conclusions of Law

- The Court has subject matter and personal jurisdiction. Plaintiff's claim was properly filed under the Federal Tort Claims Act (FTCA), 28 U.S.C.
 §§ 1346(b), 2674. Venue is proper. 28 U.S.C. § 1402(b).
- 2. Although federal law controls procedural aspects of this FTCA lawsuit, liability is to be determined by reference to state tort law. *Franklin v. United States*, 992 F.2d 1492, 1495 (10th Cir. 1993); 28 U.S.C. §§ 1346(b), 2674. Under Oklahoma law, Plaintiff must prove by a preponderance of the evidence, the following elements to establish a *prima facie* case of negligence: "(1) a duty owed by the defendant to protect the plaintiff from injury, (2) a failure to properly exercise or perform that duty, and (3) the plaintiff's injuries are proximately caused by defendant's failure to exercise his duty of care." *Henry v. Merck and Co., Inc.*, 877 F.2d 1489, 1491 (10th Cir. 1989).
- 3. Plaintiff was an invitee of Defendant on September 10, 1996, at the time of her fall. As such, Defendant owed Plaintiff a duty to keep the Post Office in a reasonably safe condition and to warn Plaintiff of dangerous conditions which are in the nature of hidden dangers, traps, snares, pitfalls and the like. *Rogers v. Hennessee*, 602 P.2d 1033, 1034 (Okla. 1979).
- 4. The premises owner or occupant is not liable for injury to an invitee resulting from a danger which was obvious or should have been observed

in the exercise of ordinary care. Williams v. Tulsa Motels, 958 P.2d 1282, 1284 (Okla. 1998).

- 5. The condition of the floor mat was reasonably safe, open and obvious.
- 6. The floor mat upon which Plaintiff fell was not a dangerous condition of which Defendant was required to give warning. Nor did the floor mat have a deceptively innocent appearance of safety which cloaks a reality of danger.
- 7. Defendant was not negligent.
- Plaintiff may not recover from Defendant for her fall on September 10,
 1996.
- Any Conclusion of Law which is more properly a Finding of Fact is deemed to be a Finding of Fact.

DATED this 25 day of May, 2000.

FRANK H. McCARTHY
UNITED STATES MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

ROBERT SIMS,	MAY 2 6 2009
Plaintiff,) Phil Lombardi, Cler U.S. DISTRICT COURT
v.) Case No. 99-CV-739-M /
KENNETH S. APFEL, Commissioner, Social Security Administration,	ENTERED ON DOCKET DATE MAY 2 6 2000
Defendant.) DATE

JUDGMENT

This action has come before the Court for consideration upon an unopposed Motion to Reverse and Remand for Further Administrative Action.

An Order reversing and remanding the case to the Commissioner has been entered.

Judgment for Plaintiff and against Defendant is hereby entered pursuant to the Court's Order and in accordance with Fed. R. Civ. P. 58.

THUS DONE AND SIGNED on this 25 day of MAY, 2000.

FRANK H. McCARTHY

United States Magistrate Judge

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

•	MAY 2 6 2000
	Phil Lombardi, Clerk U.S. DISTRICT COURT

ROBERT SIMS,) Phil Lombardi, C U.S. DISTRICT COL
Plaintiff,)
v.)) Case No. 99-CV-739-M(
v.)
KENNETH S. APFEL,)
Commissioner,)
Social Security Administration,) ENTERED ON DOCKET
Defendant.) DATE MAY 26 2000

ORDER

Upon the unopposed motion of Defendant, Commissioner of the Social Security Administration, by Stephen C. Lewis, United States Attorney of the Northern District of Oklahoma, through Cicely S. Jefferson, Special Assistant United States Attorney, it is hereby ORDERED that this case be reversed and remanded to the Commissioner for further administrative action pursuant to sentence four (4) of § 205(g) of the Social Security Act, 42 U.S.C. § 405(g). Melkonyan v. Sullivan, 501 U.S. 89 (1991).

THUS DONE AND SIGNED on this 25 day of MAY

United States Magistrate Judge

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

IN RE:

COMMERCIAL FINANCIAL SERVICES, INC. and CF/SPC NGU, INC.,

Debtor,

WILLIAM KUNTZ, III,

Appellant,

vs.

COMMERCIAL FINANCIAL SERVICES, INC., and CF/SPC NG,

Appellees.

FILED

MAY 2 5 2000

Phil Lombardi, Clerk u.s. DISTRICT COURT

Case No. 99-CV-927-B(M)

DATE MAY 26 2000

REPORT AND RECOMMENDATION

The undersigned United States Magistrate Judge RECOMMENDS that this case be DISMISSED.

By order filed April 24, 2000, the undersigned ordered Appellant to file a written brief, on or before May 5, 2000, explaining why his appeal should not be dismissed for his failure to file a designation of record or pay a filing fee. [Dkt. 4]. On April 24, 2000, Appellant filed a document entitled "Response of Appellant and request for enlargement of Time" [Dkt. 5]. That document pertained to orders entered in other appeals Appellant has filed in the Northern District of Oklahoma, 99-CV-926; 99-CV-928; and 99-CV-929, it did not address the order entered in *this* case.

On May 8, 2000, the undersigned entered an order advising Appellant that he was required to file a brief in this case specifically addressing: (1) the reasons for his failure to pay a filing fee on or before September 13, 1999, as required by the



bankruptcy court; and (2) his failure to file a designation of record in accordance with Fed.R. Bankr.P. 8006. That brief was due on or before May 16, 2000. [Dkt. 6]. To date, Appellant has failed to comply with either the April 24 or the May 8 orders.

The undersigned recommends that the appeal be dismissed due to Appellant's failure to designate the record on appeal pursuant to Fed.R. Bank.P. 8006; his failure to pay the requisite filing fee as ordered by the bankruptcy court; his failure to comply with this court's orders; and his failure to timely prosecute this appeal.

In accordance with 28 U.S.C. §636(b) and Fed. R. Civ. P. 72(b), any objections to this report and recommendation must be filed with the Clerk of the District Court for the Northern District of Oklahoma within ten (10) days of being served with a copy of this report. Failure to file objections within the time specified waives the right to appeal from the judgment of the District Court based upon the factual findings and legal questions addressed in the report and recommendation of the Magistrate Judge. Haney v. Addison, 175 F.3d 1217, 1219-20 (10th Cir. 1999), Talley v. Hesse, 91 F.3d 1411, 1412 (10th Cir. 1996), Moore v. United States, 950 F.2d 656, 659 (10th Cir. 1991).

DATED this 25 Day of May, 2000.

CERTURGA DE DA SUR LOZ

The undersigned certifies that a true copy of the foregoing pleading was served on each of the parties hereto by mailing the same to them or to their atterneys of record on the

Frank H. McCarthy

United States Magistrate Judge

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,)
Plaintiff,))
v.) CASE NO. 00-CV-49-C(J)
REAL PROPERTY KNOWN AS 2657 VAN VAC LANE, ELY, MINNESOTA, LOCATED IN THE NORTHWEST QUARTER OF THE NORTHWEST QUARTER OF SECTION 26, TOWNSHIP 63 NORTH OF RANGE 13 WEST OF THE FOURTH PRINCIPAL MERIDIAN, MORE PARTICULARLY DESCRIBED AS FOLLOWS:	FILED MAY 2 5 2000 Phil Lombardi, Clerk U.S. DISTRICT COURT
BEGINNING AT THE NORTH LINE 306.05 FEET WEST OF THE NORTHEAST CORNER; THENCE WEST 188.25 FEET; THENCE SOUTH 01 DEGREES 15'00" EAST 405.20 FEET; THENCE EAST 200 FEET; THENCE EAST 200 FEET; THENCE NORTH 02 DEGREES 54'34" WEST 405.63 FEET TO THE POINT OF BEGINNING, WITH ALL BUILDINGS, APPURTENANCES AND IMPROVEMENTS THEREON,	DATE <u>MAY 25 2000</u> DATE <u>MAY 25 2000</u>
Defendant.	,)

JUDGMENT OF FORFEITURE

This cause having come before this Court upon the plaintiff's Motion for Judgment of Forfeiture as to the defendant real property and all entities and/or persons interested in the defendant real property, the Court finds as follows:

The verified Complaint for Forfeiture *In Rem* was filed in this action on the 18th day of January 2000, alleging that the defendant real property was subject to forfeiture



pursuant to 18 U.S.C. § 981(a)(1)(A) because it was involved in transactions or attempted transactions in violation of 18 U.S.C. § 1344 (bank fraud) as specified unlawful activity defined under Title 18 U.S.C. §§ 1956 and 1957, incorporating the provisions of Title 18 U.S.C. § 1961 and pursuant to Title 18 U.S.C. § 981(a)(1)(C) because it constitutes or is derived from proceeds traceable to a violation of 18 U.S.C. § 1344.

A Warrant of Arrest and Notice *In Rem* was issued on the 24th day of January 2000, by this Court to the United States Marshal for the Northern District of Oklahoma for publication in the Northern District of Oklahoma and in the district where the real property is located.

A Warrant of Arrest and Notice *In Rem* was issued on the 24th day of January 2000 by this Court to the United States Marshal for the District of Minnesota for the seizure and arrest of the defendant real property.

The United States Marshals Service served a copy of the Complaint for Forfeiture In Rem and the Warrant of Arrest and Notice In Rem on the defendant real property on March 1, 2000.

Emery Bulinski, Dolores Bulinski, Russell Guiou and Katherine Guiou were determined to be the only individuals with possible standing to file a claim to the defendant real property, and, therefore the only individuals to be served with process in this action. United States Marshals Service forms reflecting personal service on the potential claimants are on file herein.

All persons and/or entities interested in the defendant real property were required to file their claims herein within ten (10) days after service upon them of the Complaint

Warrant of Arrest and Notice *In Rem*, publication of the Notice of Arrest and Seizure, or actual notice of this action, whichever occurred first, and were required to file their answer(s) to the Complaint within twenty (20) days after filing their respective claim(s).

No claims or answers have been filed of record in this action with the Clerk of the Court, in respect to the defendant real property, and no persons or entities have plead or otherwise defended in this suit as to said defendant real property, save and except Emery Bulinski and Dolores Bulinski, and the time for presenting claims and answers, or other pleadings, has expired; and, therefore, default exists as to the defendant real property and all persons and/or entities interested therein, save and except Emery Bulinski and Dolores Bulinski.

The United States Marshals Service gave public notice of this action and arrest to all persons and entities by advertisement in the <u>Tulsa Daily Commerce and Legal News</u>, a newspaper of general circulation in the district in which this action is pending on April 3, 13 and 20, 2000. Proof of Publication was filed May 1, 2000. The United States Marshals Service gave further public notice of this action and arrest to all persons and entities by advertisement in <u>The Ely Echo</u>, Ely, Minnesota, a newspaper of general circulation in the district in which the defendant real property is located on April 3, 10 and 17, 2000. Proof of Publication was filed April 26, 2000.

Emery Bulinski and Dolores Bulinski filed their Claim on March 23, 2000, whereby they claimed an interest in the defendant real property. Thereafter, on April 10, 2000, the Court approved a Stipulated Expedited Settlement Agreement entered into between Emery Bulinski and Dolores Bulinski and the Government.

IT IS, THEREFORE, ORDERED, ADJUDGED, AND DECREED that the following-described defendant real property:

REAL PROPERTY KNOWN AS 2657 VAN VAC LANE, ELY, MINNESOTA, LOCATED IN PART OF NORTHWEST QUARTER OF NORTHWEST QUARTER (NW 1/4 OF NW 1/4), SECTION TWENTY-SIX (26), TOWNSHIP SIXTY-THREE (63) NORTH OF RANGE THIRTEEN (13) WEST OF THE FOURTH PRINCIPAL MERIDIAN, ST. LOUIS COUNTY, MINNESOTA, DESCRIBED AS FOLLOWS:

Beginning at the North line 306.05 feet West of the Northeast corner; thence West 188.25 feet; thence South 01 degrees 15'00" East 405.20 feet; thence East 200 feet; thence North 02 degrees 54'34" West 405.63 feet to the point of beginning;

WITH ALL BUILDINGS, APPURTENANCES AND IMPROVEMENTS THEREON

be, and it hereby is, forfeited to the United States of America for disposition according to law.

IT IS FURTHER ORDERED by the Court that the proceeds of the sale of the above-described real property, its buildings, appurtenances, and improvements, shall be distributed in the following priority:

- First, for the payment to the United States of all expenses of forfeiture of the defendant real property, including, but not limited to expenses of seizure, custody, advertising, and sale;
- Second, for payment of all real estate taxes owed on the property to the date of the entry of this judgment of forfeiture, to the extent that the United States of America is responsible for said taxes;
- 3) Third, from the sale of the defendant real property, payment of the stipulated settlement to Emery Bulinski and Dolores

Bulinski pursuant to the terms of the Stipulated Expedited Settlement Agreement filed herein on April 10, 2000.

4) Fourth, the remaining proceeds from the sale of the defendant property shall be deposited in the asset forfeiture fund according to law.

Entered this 24 day of May, 2000.

H. DALE COOK

Senior Judge of the United States District Court for the Northern District of Oklahoma

SUBMITTED BY:

CATHERINE J. DEPEW

Assistant United States Attorney

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

JANET K. HAYWORTH,) ENTERED ON DOCKET
Plaintiff,) DATE MAY \$ 5 2000
v.) Case No. 00-CV-281-K (J)
BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY, and BOYD L. SWAGER,	FILED
Defendant.) MAY 2 5 2000 () Phil Lombardi, Clerk U.S. DISTRICT COURT

Before the Court is the motion of the plaintiff to remand. Plaintiff commenced this action in state court, arising out of a vehicle-train collision. Plaintiff, an Oklahoma resident, sued the railroad (a foreign corporation) and Boyd Swager, the driver of the vehicle in which she was a passenger (an Oklahoma resident). Swager has never answered the complaint and now stands in default. However, plaintiff has not sought the entry of default judgment against him in state court.

On April 6, 2000, defendant railroad removed the action to this Court, acknowledging that Swager was a non-diverse party, but arguing that he was merely a "nominal" party because he stood in default. Plaintiff has moved to remand. Plaintiff has cited cases, such as <u>Higgins v. Yellow Cab Co.</u>, 68 F.Supp. 453 (N.D.III.1946) which hold that the entry of a default <u>judgment</u> against a non-diverse defendant does not remove him from the case such

that removal is appropriate. These cases are inapposite, because plaintiff has not sought a default judgment against Swaker.

Defendant railroad argues that plaintiff's failure to seek default judgment against Swager demonstrates that he is merely a nominal party, joined by plaintiff to defeat diversity. So far as the Court can determine, no court has addressed this precise issue, but the Court rejects the railroad's argument under general principles.

There is a presumption against removal jurisdiction and the burden is on the removing party. Laughlin v. Kmart Corp., 50 F.3d 871, 873 (10th Cir.1995). The test for concluding that a nominal party has been joined to defeat diversity is whether no basis for relief under controlling substantive law has been stated. Wise v. Lincoln Logs Ltd., 889 F.Supp. 549 (D.Conn.1995). The Court cannot state that no claim for negligence has been stated against Swager in the state court petition. Defendant railroad has failed to meet its burden.

It is the Order of the Court that the motion of the plaintiff to remand (#2) is hereby GRANTED. Pursuant to 28 U.S.C. §1447(c), this action is hereby REMANDED to the District Court of Ottawa County, State of Oklahoma.

ORDERED THIS 24 DAY OF May, 2000

TERRY C. KERN, CHIEF

Mr. Sol

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

F	Ι	L	E	$\mathbf{D}_{\!$
•	MAY	2 5	2000	D

UNITED STATES OF AMERICA,	Phil Lombardi, Clerk U.S. DISTRICT COURT	
Plaintiff,		
vs.) CASE NO. 00CV0395C(M)	
DOUGLAS S. ADAIR,))	
Defendant.	ENTERED ON DOCKET	
	DATE	

AGREED JUDGMENT AND ORDER OF PAYMENT

Plaintiff, the United States of America, having filed its Complaint herein, and the defendant, having consented to the making and entry of this Judgment without trial, hereby agree as follows:

- 1. This Court has jurisdiction over the subject matter of this litigation and over all parties thereto. The Complaint filed herein states a claim upon which relief can be granted.
- 2. The defendant hereby acknowledges and accepts service of the Complaint filed herein.
- 3. The defendant hereby agrees to the entry of Judgment in the principal sum of \$3,042.86, plus accrued interest of \$1,194.16, plus interest thereafter at the rate of 10% per annum until judgment, plus filing fees in the amount of \$150.00, plus interest thereafter at the legal rate 6,197% until paid, plus costs of this action, until paid in full.

3

- 4. In addition to the regular monthly payment, the defendant hereby agrees to the submission of this debt to the Department of Treasury for inclusion in the Treasury Offset Program.

 Under this program, any federal payment the defendant would normally receive may be offset and applied to this debt.
- 5. Plaintiff's consent to the entry of this Judgment and Order of Payment is based upon certain financial information which defendant has provided it and the defendant's express representation to Plaintiff that he is unable to presently pay the amount of indebtedness in full and the further representation of the defendant that Douglas S. Adair will well and truly honor and comply with the Order of Payment entered herein which provides terms and conditions for the defendant's payment of the Judgment, together with costs and accrued interest, in regular monthly installment payments, as follows:
- (a) Beginning on or before the 15th day of June, 2000, the defendant shall tender to the United States a check or money order payable to the U.S. Department of Justice, in the amount of \$100.00, and a like sum on or before the 15th day of each following month until the entire amount of the Judgment, together with the costs and accrued postjudgment interest, is paid in full.
- (b) The defendant shall mail each monthly installment payment to: United States Attorney, Financial Litigation Unit, 333 West 4th Street, Suite 3460, Tulsa, Oklahoma 74103-3809.
- (c) Each said payment made by defendant shall be applied in accordance with the U.S. Rules, i.e., first to the payment of costs, second to the payment of postjudgment interest (as provided by 28 U.S.C. § 1961) accrued to the date of the receipt of said payment, and the balance, if any, to the principal.

- (d) The defendant shall keep the United States currently informed in writing of any material change in his/her financial situation or ability to pay, and of any change in his/her employment, place of residence or telephone number. Defendant shall provide such information to the United States Attorney at the address set forth above.
- (e) The defendant shall provide the United States with current, accurate evidence of his/her assets, income and expenditures (including, but not limited to his/her Federal income tax returns) within fifteen (15) days for the date of a request for such evidence by the United States Attorney.
- 6. Default under the terms of this Agreed Judgment will entitle the United States to execute on this Judgment without notice to the defendant.
- 7. The parties further agree that any Order of Payment which may be entered by the Court pursuant hereto may thereafter be modified and amended upon stipulation of the parties; or, should the parties fail to agree upon the terms of a new stipulated Order of Payment, the Court may, after examination of the defendant, enter a supplemental Order of Payment.
 - 8. The defendant has the right of prepayment of this debt without penalty.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiffhave and recover judgment against the Defendant, Douglas S. Adair, in the principal amount of \$3,042.86, plus accrued interest in the amount of \$1,194.16, plus interest at the rate of 10 until judgment, plus

UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM:

Stephen C. Lewis United States Attorney

PHIL PINNELL, OBA #7169 Assistant United States Attorney

DOUGLAS S. ADAIR

PEP/llf

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

MARIA FITZPATRICK, as parent)	
and next friend of TIMOTHY	j j	ENTERED ON DOCKET
FITZPATRICK, a minor))	DATE MAY 2 5 2000
Plaintiff,)	
v.)	Case No. 99-CV-782-K (E)
TULSA PUBLIC SCHOOLS, an)	
Oklahoma political subdivision, and)	
ANDREW WILSON, both in his)	
individual capacity and as Dean of)	$\mathbf{F} \mathbf{I} \mathbf{L} \mathbf{E} \mathbf{D}$
Students at Rogers High School,)	
)	MAY 2 4 2000 (A)
Defendants.)	$\eta \nu$
		Phil Lombardi, Clerk U.S. DISTRICT COURT
	ORDER	- TOOM

Before the Court is the motion to dismiss of Independent School District No. 1 of Tulsa County, Oklahoma ("Tulsa School District"), sued as "Tulsa Public Schools." Tulsa School District asks the Court to dismiss Plaintiff's claims against it for failure timely to serve as required by Fed. R. Civ. P. 4(m). Plaintiff served Tulsa School District sixty days past the 120-day deadline for service. Plaintiff apparently has not served the remaining defendant, Andrew Wilson, some eight months after the filing of her complaint. Plaintiff asserts that her failure timely to serve the School District resulted from the mistake or inadvertence of her counsel.

Rule 4(m) authorizes the Court to dismiss a plaintiff's complaint or direct hat service be effected within a specified time if the plaintiff has failed to effectuate service within 120



days after filing the complaint. If the plaintiff shows good cause for the failure, then the Court must extend the time for service. *See* Fed. R. Civ. P. 4(m). Otherwise, the Court may exercise its discretion.

Plaintiff has not shown good cause for her failure timely to serve Tulsa School District. Inadvertence, negligence, or mistake of counsel is not, by itself, good cause under Rule 4(m). See Broitman v. Kirkland (In re Kirkland), 86 F.3d 172, 176 (10th Cir. 1996). Moreover, given the extreme tardiness of Plaintiff's service of this defendant and failure to return service on the other defendant, the Court does not consider an extension of time appropriate.

IT IS THEREFORE ORDERED that Defendant School District's Motion to Dismiss (# 9) is GRANTED and Plaintiff's claims against Defendant Tulsa Public Schools are DISMISSED WITHOUT PREJUDICE.

ORDERED this 23 day of MAY 2000.

TERRY C. KERN, CHIEF

UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

WILLIAM EDGAR BENSLEY,)	
Petitioner,)	
vs.) No. 97-CV-559	K (J)
STEPHEN KAISER, Warden,)	FILED
Respondent.)	MAY 2 4 2000
	ORDER	Phil Lombardi, Clerk U.S. DISTRICT COURT

Before the Court for consideration is the petition for a writ of habeas corpus filed by Petitioner, a state inmate appearing *pro se*. Respondent has filed a response pursuant to Rule 5, Rules Governing Section 2254 Cases (Docket #3). Petitioner has filed a reply to Respondent's response (#11). For the reasons discussed below, the Court finds the petition should be denied.

BACKGROUND

Petitioner attacks his conviction entered in Craig County District Court, Case No. CRF-95-48. A jury found Petitioner guilty of the following crimes: Possession of Marijuana, After Former Conviction of Two or More Felonies, for which he received a sentence of thirty (30) years; Possession of Methamphetamine, After Former Conviction of Two or More Felonies, for which he received a sentence of fifty (50) years; and Possession of Drug Paraphernalia, for which he received a sentence of one (1) year in the county jail and a \$1000 fine.

Petitioner appealed his conviction to the Oklahoma Court of Criminal Appeals ("OCCA").

On direct appeal, Petitioner raised the following propositions of error:

Proposition I: Appellant's convictions should be dismissed, because the evidence on which they depend was the fruit of an illegal detention by the officers

13

with absolutely no reasonable suspicion for detaining appellant, much less pursuing him.

Proposition II: Appellant's sentences are excessive and should be modified.

(#3, Ex. A). On March 24, 1997, the OCCA entered its unpublished summary opinion affirming Petitioner's conviction and sentence. (#3, Ex. C). Petitioner has not sought post-conviction relief in the state courts.

Petitioner filed the instant petition for writ of habeas corpus on May 20, 1997, in the United States District Court for the Eastern District of Oklahoma. On June 5, 1997, the case was transferred to this district court. He raises two grounds of error: (1) that Petitioner's conviction was obtained by use of evidence obtained pursuant to an unlawful search and seizure in violation of the Fourth Amendment of the U.S. Constitution, through unlawful stop and warrantless seizure, and (2) the Oklahoma Court of Criminal Appeals's Summary Opinion was inadequate and offended Due Process under the Fifth and Fourteenth Amendments of U.S. Constitution. In response, Respondent argues that Petitioner's Fourth Amendment claim is barred on the basis of Stone v. Powell, 428 U.S. 465 (1976), and that Petitioner's second claim, challenging the OCCA's summary opinion format, is without merit.

ANAL YSIS

A. Exhaustion

As an initial matter, the Court must determine whether Petitioner meets the exhaustion requirements of 28 U.S.C. § 2254(b); see also Rose v. Lundy, 455 U.S. 509, 510 (1982). Respondent concedes that Petitioner has exhausted his Fourth Amendment claim and expressly waives the exhaustion requirement as to Petitioner's second claim. Therefore, the Court finds that Petitioner meets the exhaustion requirements under the law.

B. Evidentiary hearing

The Court finds that an evidentiary hearing is not necessary as Petitioner has not met his burden of proving entitlement to an evidentiary hearing. See Miller v. Champion, 161 F.3d 1249 (10th Cir. 1998). The state trial court held a hearing on Petitioner's motion to suppress evidence but denied the relief requested. See #3, Ex. E. Thus, Petitioner had an opportunity to develop the factual basis of his claim in state court and he shall not be deemed to have "failed to develop the factual basis of a claim in state court." 28 U.S.C. § 254(e)(2). Therefore, as to Petitioner's Fourth Amendment claim, his request for an evidentiary hearing is governed by standards in effect prior to enactment of the Antiterrorism and Effective Death Penalty Act ("AEDPA") rather than by 28 U.S.C. § 2254(e)(2), as amended by the AEDPA. Miller, 161 F.3d at 1253. Under pre-AEDPA standards, in order to be entitled to an evidentiary hearing, Petitioner must make allegations which, if proven true and "not contravened by the existing factual record, would entitle him to habeas relief." Id. Petitioner's Fourth Amendment claim, as discussed below, is barred by the doctrine announced in Stone v. Powell, 428 U.S. 465 (1976). In addition, the second ground of error asserted by Petitioner in this case presents no issue of fact. Therefore, the Court finds that an evidentiary hearing is not necessary in this case.

C. Petitioner's claims

1. Fourth Amendment claim

As his first proposition of error, Petitioner argues that his convictions were obtained as the result of an unlawful search and seizure in violation of the Fourth Amendment. Petitioner presented this argument both to the trial court and to the OCCA on direct appeal. In <u>Stone v. Powell</u>, 428 U.S.

465, 494 (1976), the Supreme Court stated that where the state has provided an opportunity for full and fair litigation of a Fourth Amendment claim, a state prisoner may not be granted federal habeas corpus relief on the ground that evidence obtained in an unconstitutional search and seizure was introduced at trial. The Tenth Circuit has reiterated that a federal habeas corpus court need not address a Fourth Amendment question as long as the state court has given the petitioner a full and fair opportunity for a hearing on the issue. Miranda v. Cooper, 967 F.2d 392, 400-01 (10th Cir. 1992).

In this case, Petitioner was provided at least two opportunities in the state courts to fully, fairly, and adequately litigate the admissibility of the evidence in question. Petitioner filed a motion to dismiss, or in the alternative, to suppress evidence in the state trial court. (#3, Ex. D). Prior to hearing evidence in the case, the trial court conducted a hearing on the motions where Petitioner's counsel presented argument in support of the motions. (#3, Ex. E). However, the trial court judge rejected counsel's arguments and denied the motions. (Id.) Petitioner also raised this issue in his direct criminal appeal where the OCCA affirmed his conviction, stating that "[a]fter thorough consideration of the entire record before us on appeal including the original record, transcripts, briefs and exhibits of the parties, we have found that neither reversal nor modification is required under the law and evidence." (#3, Ex. C at 2).

Therefore, based on the record, the Court concludes that Petitioner had a full and fair opportunity to litigate his Fourth Amendment claim in the state courts. As a result, this Court is precluded from considering the first issue raised in Petitioner's application for a writ of habeas corpus based on Stone v. Powell, 428 U.S. 465, 494 (1976).

2. Petitioner's second claim lacks merit

As his second proposition of error, Petitioner asserts that the OCCA's use of a "summary opinion" format in affirming his conviction on direct appeal deprived him of due process in violation of the Fifth and Fourteenth Amendments. This claim is without merit. It is well-established that there is no constitutional requirement that an appellate court accompany a decision with a written opinion. See Taylor v. McKeithen, 407 U.S. 191, 194 n.4 (1972) (recognizing that "courts of appeal should have wide latitude in their decisions of whether or how to write opinions"); see also King v. Champion, 55 F.3d 522, 526 (10th Cir. 1995) (specifically finding no constitutional infirmity in Oklahoma Court of Criminal Appeals' decision to use summary opinions). Because the OCCA's issuance of a summary opinion did not deprive Petitioner of due process, habeas corpus relief on this claim is denied.

CONCLUSION

After carefully reviewing the record in this case, the Court concludes that the Petitioner has not established that he is in custody in violation of the Constitution or laws of the United States.

ACCORDINGLY, IT IS HEREBY ORDERED that the petition for a writ of habeas corpus is denied. The Clerk is directed to send a copy of this Order to the Tenth Circuit Court of Appeals.

SO ORDERED this 23 day of May

UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

WILLIAM EDGAR BENSLEY,)
Petitioner,)
VS.) No. 97-CV-559 K (J)
STEPHEN KAISER, Warden,	FILED
Respondent.	MAY 2 4 2000
	Phil Lombardi, Clerk U.S. DISTRICT COURT

JUDGMENT

This matter came before the Court upon Petitioner's 28 U.S.C. § 2254 petition for writ of habeas corpus. The Court duly considered the issues and rendered a decision herein.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that judgment is hereby entered for Respondent and against Petitioner.

SO ORDERED THIS 23 day of May, 2000

TERRY C. KERN, Chief Judge

UNITED STATES DISTRICT COURT

	TES DISTRICT COURT FOR THE
NORTHERN D	ISTRICT OF OKLAHOMA FILE I
SRC HOLDINGS CORPORATION, a Missouri corporation,	MAY 23 2000 (
Plaintiff,	Phil Lombardi, Clerk U.S. DISTRICT COURT
v.) Case No. 98-CV-944-EA
KENNETH L. ARNOLD, an Oklahoma resident,	DATE MAY 2 4 2000
Defendant	DATE

JOURNAL ENTRY OF JUDGMENT

The above-referenced matter came on before the Court for trial on May 8, 2000, Plaintiff appearing by its representative William D. Sheppard, and through its counsel, James P. McCann and Rebecca M. Fowler, of Doerner, Saunders, Daniel & Anderson, L.L.P., and Defendant, Kenneth L. Arnold, appearing in person and by and through his counsel, Stephen Q. Peters and Eric W. Stall, of Harris, Gordon, McMahan, Peters & Thompson, the parties, announcing that they were ready for trial, selected a jury which was duly empanelled and sworn, presented evidence, argument, and other matters, both by way of witness and documentary exhibits, and the jury, on May 12, 2000, after being first duly instructed by the Court, retired to deliberate and entered the following verdicts in favor of SRC Holdings Corporation:

1. On the claim of SRC Holdings Corporation for intentional interference with contractual relations, the jury found in favor of SRC Holdings Corporation and granted actual damages in the amount of Five Thousand Six Hundred and 00/100 Dollars (\$5,600.00) and, awarded punitive damages in the amount of Twelve Thousand Five Hundred and 00/100 Dollars (\$12,500.00).

E

- 2. On Defendant, Kenneth L. Arnold's counterclaim for fraud and misrepresentation, the jury entered a verdict in favor of Plaintiff, SRC Holdings Corporation.
- 3. On Defendant, Kenneth L. Arnold's counterclaim for breach of fiduciary duty, the jury entered a verdict in favor of Plaintiff, SRC Holdings Corporation.
- 4. On Defendant, Kenneth L. Arnold's counterclaim for intentional interference with prospective economic gain, the jury entered a verdict in favor of Plaintiff, SRC Holdings Corporation.

In light of the foregoing verdicts having been entered by the jury, and for good cause shown. THE COURT ENTERS THE FOLLOWING ORDERS:

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that Plaintiff, SRC Holdings Corporation, be and is hereby granted judgment against Defendant, Kenneth L. Arnold, for actual damages in the amount of Five Thousand Six Hundred and 00/100 Dollars (\$5,600.00), with pre-judgment interest at the rate permitted by law thereon from and after June 10, 1999, until May 12, 2000, and thereafter at the post-judgment rate of interest permitted by law; and punitive damages in the amount of Twelve Thousand Five Hundred and 00/100 Dollars (\$12,500.00), with post-judgment interest thereon at the rate permitted by law from and after May 12, 2000.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that SRC Holdings Corporation be and is hereby awarded judgment in its favor and against the Defendant, Kenneth L. Arnold, on each of three counterclaims of Defendant for fraud and misrepresentation; breach of fiduciary duty; and intentional interference with prospective economic gain.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED, in light of the verdict of the jury in this matter, and the Court's consideration of the evidence, that SRC Holdings

Corporation be and is hereby entitled to a declaratory judgment to the effect that none of the determinations of the jury herein shall in any way affect the validity and enforceability of the Stock Purchase Agreement between all shareholders of Tulsa Equipment & Manufacturing, Inc. and Tuboscope Vetco International, Inc.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the request of SRC Holdings Corporation for injunctive relief herein is, by virtue of the decisions referenced above, rendered moot.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that, as the prevailing party herein, SRC Holdings Corporation shall be entitled to recover its costs of the action, provided that it complies with the requirements of Local Civil Rule 54.1, Local Civil Rules of the United States District Court for the Northern District of Oklahoma.

DATED this 22 day of May, 2000.

CLAIRE V. EAGAN

UNITED STATES MAGISTRATE JUDGE

agreed (s) o form

James P. McCann, OBA No. 5865 Resecca M. Fowler, OBA No. 13682

DOERNER, SAUNDERS, DANIEL &

ANDERSON, L.L.P.

320 S. Boston, Suite 500

Tulsa, OK 74103

(918) 582-1211

Attorneys for Plaintiff, SRC Holdings Corp.

Stephen Q. Peters

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1924 S. Utica, Suite 700

Tulsa, OK 74104-6512

(918) 743-6201

Attorneys for Defendant, Kenneth L. Arnold

	S DISTRICT COURT FOR THE F 1 L E L' STRICT OF OKLAHOMA MAY 2 3 2000
JAMES M. MORGAN, JR.,) Phil Lombardi, Clerk U.S. DISTRICT COURT
Plaintiff,	
v.) Case No. 99-CV-1023-M
UNITED STATES OF AMERICA,) ENTERED ON DOCKET MAY 2 4 2000
Defendant.) DATE

ORDER DISMISSING CASE WITH PREJUDICE

This matter comes on for consideration before the Court upon the stipulation of all parties, and the Court, being fully advised in the premises, ORDERS, ADJUDGES AND DECREES that all claims asserted by Plaintiff, James M. Morgan, Jr., against the United States of America, are hereby dismissed with prejudice.

FRANK H. McCARTHY
United States Magistrate Judge

Approved as to Form and Content:

H. I. Aston

3242 E. 30th Pl.

Tulsa, OK 74114-5831

918.749.8523

Cathryn McClanahan, OBA #14853

Assistant United States Attorney

333 W. 4th St., Ste. 3460

Tulsa, OK 74103-3809

918.581.7463

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

GARLAND LANE, Plaintiff, VS. ENTERED ON DOCKET ELEMENTARY SCHOOL DISTRICT, MAY 2 4 2000 NO. 30 OF DELAWARE COUNTY, OKLAHOMA a/k/a KENWOOD PUBLIC SCHOOLS; JOHNNIE BACKWATER, and JERRY WHITEDAY, individually, and) JOHNNIE BACKWATER, as a member of the Board of Education of Elementary School District No. 30 of Delaware County, Oklahoma; Phil Lombardi, Clerk U.S. DISTRICT COURT Defendants.

JUDGMENT

This matter is before the court on remand from the United States Court of Appeals, Tenth Circuit, for entry of stipulated judgment following settlement of the dispute on appeal pursuant to Rule 33.1, Rules of the Tenth Circuit, and Rule 42(b), Federal Rules of Appellate Procedure.

Pursuant to the stipulations of the parties the court finds as follows:

- On June 18, 1997, this court entered judgment in favor of Garland Lane and against Elementary School District No. 30 of Delaware County, Oklahoma, in the amount of two hundred and fifteen thousand dollars (\$215,000.00) and against Johnnie Backwater in the amount of one hundred dollars (\$100.00).
- 2. On September 28th, 1998, this court entered judgment for attorney fees in favor of plaintiff and against the Defendants in the sum of one hundred and ten thousand, seven hundred and



seventeen dollars and fifty cents (\$110, 117.50 and subsequently entered judgment for costs in favor of plaintiff and against the defendants in the amount of six thousand, five hundred dollars (\$6,500.00).

- 3. Appeal of the judgment of this court was filed in THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT styled as Garland Lane, Plaintiff-Appellee, Cross-Appellant, v. Elementary School District No. 30, Delaware County, Oklahoma, also known as Kenwood Public Schools, separately and Johnnie Backwater, Joseph Pigeon and Phillip O'Field as members of the Board of Education of Elementary School District No. 30 of Delaware County, Oklahoma; Johnnie Backwater, individually; Jerry Whiteday, individually, Defendants Appellants, Cross-Appellees. Case Nos. 97-5141 and 97-5148.
- 4. On May 5th, 1998, a mediated settlement agreement was reached between the parties to the appeal. The agreement was memorialized, executed by the parties and presented to the court as part of a Joint Motion To Dismiss And Remand. The monetary terms of the parties' agreement reflected a total sum in settlement of plaintiff's claims of three hundred five thousand and six hundred dollars (\$305,600.00) apportioned as follows: \$199,100.00 for plaintiff's substantive claims, \$100,000.00 for plaintiff's attorney's fees, and \$6,500.00 for plaintiff's costs and expenses. The sum of one hundred twenty-six thousand, five hundred dollars (\$126,500.00) was payable immediately upon execution of the agreement and to be divided as follows: \$60,000.00 to Garland Lane as partial payment for his claims and \$66,500.00 to Lana Tyree, his attorney, as reimbursement of costs (\$6500.00) and in partial satisfaction (\$60,000.00) of attorneys fees totaling \$100,000.00. The agreement was to cause the remainder of the total consideration (\$305,600.00) to be reduced to judgment in

favor of Garland Lane and against the School District in the amount of \$139,100.00 and in favor of Garland Lane and Lana Tyree, his attorney, in the amount of \$40,000.00. The judgment was to be at the Oklahoma Statutory rate of interest from June 17, 1997, until paid. Pursuant to the parties' agreement, the immediate payment of \$126,500.00 was made and the matter submitted to the court for entry of judgment in the Joint Motion To Dismiss.

- On June 10th, 1998, pursuant to the Joint Motion of the parties, the United States Court of Appeals for the Tenth Circuit entered its ORDER AND JUDGMENT dismissing the appeals, vacating the judgment of this court, and remanding the case to this court for entry of a stipulated judgment. A copy of the court's ORDER AND JUDGMENT has been filed with this court and its terms are incorporated herein by reference as though set forth fully wordfor-word.
- 6. Pursuant to the stipulations of the parties and the ORDER AND JUDGMENT of the United States Court of Appeals for the Tenth Circuit on remand to this court, judgment should be and hereby is entered in favor of Garland Lane and against the defendant Elementary School District No. 30 of Delaware County, Oklahoma, in the amount of one hundred seventy nine thousand dollars (\$179,000.00) with interest thereon from June 17, 199, at the rate provided by the statutes of the State of Oklahoma and specifically, Title 12 O.S. §727, until paid but not to exceed ten (10) percent per year; provided, however, that in the event the taxing authority of Delaware County, Oklahoma, fails to fully satisfy the stipulated judgment as against Elementary School District No. 30, this court shall, upon motion of either party, vacate this judgment and enter an order consistent with the directions of the JUDGMENT AND ORDER of the United States Court of Appeals for the Tenth Circuit remanding this

case.

IT IS SO ORDERED THIS 23 DAY OF $\frac{M_{Ay}}{2000}$.

TERRY C. KERN, CHIEF United States District Judge

APPROVED AS TO FORM:

LANA JEANNE TYREE, Esq. (OBA #9151)

Attorney for Plaintiff, Garland Lane

2516 Northwest Expressway Oklahoma City, OK 73112

Telephone: 405-943-3813

MARK S. RAINS, Esq. (OBA #10935)

Rosenstein, Fist & Ringold

Attorney for Defendants Elementary School District No. 30, Delaware County, Oklahoma; Johnnie

Backwater; and Jerry Whiteday

525 South Main, Suite 700

Tulsa, OK 74103-4508

Telephone: 918-583-5617

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

GAY SCOTT HEARN,) ENTERED ON DOCKET
Plaintiff,) DATE MAY 24 2000
vs.) 99-CV-0891-K (J) /
FURNITURE FACTORY OUTLET, INC., an Arkansas Corporation, and	$\{$ FILED $\}$
GARY MASNER, an Individual,	MAY 2 4 200U
Defendants.	Phil Lombardi, Clerk U.S. DISTRICT COURT

ORDER DISMISSING DEFENDANTS' COUNTERCLAIM

Based on the stipulation of the parties filed on May , 2000, it is now ordered that the counterclaims of the Defendants, FURNITURE FACTORY OUTLET, INC. ("FFO") and GARY MASNER, alleging perjury and civil conspiracy are hereby dismissed without prejudice.

Dated this 23 day of May, 2000.

THE HONORABLE TERRY KERN

Mark D. Lyons, OBA #5590 Kevin Danielson, OBA #12258 LYONS, CLARK, DANIELSON & O'MEILIA 616 S. Main, Suite 201 Tulsa, Oklahoma 74119 (918) 599-8844; Fax: (918) 599-8585 Attorneys for the Defendants



CERTIFICATE OF SERVICE

I hereby certify that on the / day of May, 2000, I caused a true and correct copy of the above and foregoing instrument to be delivered via U.S. First Class Mail, with proper postage fully pre-paid thereon, to the following:

Randall L. Iola First Place Tower 15 East Fifth Street, Suite 2750 Tulsa, Oklahoma 74103-4334

R. Tom Hillis Barkley, Titus, Hillis & Reynolds First Place Tower 15 East Fifth Street, Suite 2750 Tulsa, Oklahoma 74103

Philip J. Milligan Milligan Law Offices 805 Garrison Avenue P.O. Box 2347 Fort Smith, AR 72902-2347

Mark D. Lyons

1/1/1/

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

MAY 2 4 2000

KEYBANK, N.A., a national banking association,	U.S. DISTRICT COURT
Plaintiff,	
V.)
MID-CONTINENT TRANSPORTATION) Case No. OOCV0206H (M)
RESOURCES, INC., an Oklahoma corporation	
formerly known as "Equity Transportation)
Resources, Inc."; EQUITY REAL ESTATE)
MANAGEMENT, L.L.C., an Oklahoma limited)
liability company; MID-CONTINENT GROUP	ENTERED ON DENTRET
INC., an Oklahoma corporation formerly	MAY 24 2000
known as "Equity Resources Capital Corporation") DATE
and also formerly known as "Heartland Capital)
Group, Inc."; EQUITY FINANCIAL)
CORPORATION, an Oklahoma corporation;)
AMERICAN TITLE & ESCROW CO.,INC.,)
an Oklahoma corporation; HEARTLAND)
INSURANCE SERVICES AGENCY, INC., an)
Oklahoma corporation; all doing business as) }
"THE EQUITY COMPANIES"; CARRIER KING,)
INC., an Oklahoma corporation; CARRIER KING)
ACQUISITION CORP., an Oklahoma corporation;	
HEARTLAND FEDERAL MORTGAGE CORP.,)
an Oklahoma corporation; CARY K. COPE,)
an individual; LEASA K. MORRIS a/k/a "Kim)
Morris", a/k/a "Leasa K. Parker", an individual;)
MICHAEL JEFFREY MORRIS, an individual;)
and TAMORA McCARTY, a/k/a "Tami McCarty",	ý
an individual,)
Defendants.	Í

NOTICE OF DISMISSAL PURSUANT TO F.R.C.P. 41(a)(1)(i)

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Plaintiff, KEYBANK, N.A., by its counsel, Lyons, Clark, Danielson & O'Meilia, pursuant to Rule 41(a)(1)(i) of the Federal Rules of Civil Procedure, and Defendant MICHAEL JEFFREY MORRIS having not filed or served an answer or motion for summary judgment, hereby dismisses Counts One and Two, only, as to Defendant MICHAEL JEFFREY MORRIS, only, reserving all rights arising out of the transactions which are the subject of this action and which Plaintiff may have against the remaining Defendants or any other person or entity.

Respectfully submitted,

Mark D. Lyons, OBA #2559

Kevin Danielson, OBA #12258 David E. O'Meilia, OBA #6779

LYONS, CLARK, DANIELSON & O'MEILIA

616 S. Main, Suite 201

Tulsa, Oklahoma 74119-1260

Telephone: (918) 599-8844

Fax: (918) 599-8585

ATTORNEYS FOR PLAINTIFF

CERTIFICATE OF SERVICE

I hereby certify that on the **24** day of May, 2000, I caused a true and correct copy of the above and foregoing instrument to be delivered via U.S. First Class Mail, with proper postage fully pre-paid thereon, to the following:

- R. Thomas Seymour
- C. Robert Burton
- F. Randolph Lynn
- R. THOMAS SEYMOUR ATTORNEYS

100 West 5th Street, Suite 550

Tulsa, Oklahoma 74103

ATTORNEYS FOR HEARTLAND INSURANCE SERVICES AGENCY, INC., HEARTLAND FEDERAL MORTGAGE CORP., CARY COPE, and CARRIER KING, INC.

C. Michael Copeland

James E. Weger

Robert R. Peters, II

JONES, GIVENS, GOTCHER & BOGAN

15 East Fifth Street, Suite 3800

Tulsa, Oklahoma 74103

ATTORNEYS FOR MID-CONTINENT TRANSPORTATION RESOURCES, INC., MID-CONTINENT GROUP, INC., LINDA K. MORRIS, MICHAEL JEFFREY MORRIS, and TAMORA McCARTY

David E. O'Meilia



FILED

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

MAY 2 4 2000

JULIE A. VERARDO.)	U.S. DISTRICT COURT
Plaintiff,)	900Hf
vs.)	Case No. 99-CV-0474K(M)
ADAMS AND ASSOCIATES, INC.,)	Judge Kern
Defendant.)	
		DATE MAY 2 4 2000

JOINT STIPULATION OF DISMISSAL WITH PREJUDICE

Pursuant to Rule 41 of the Federal Rules of Civil Procedure, Plaintiff Julie A. Verardo and Defendant Adams and Associates, Inc. and stipulate to dismissal with prejudice of this case, as all issues between them have now been compromised, settled, satisfied and resolved. The parties shall bear their own costs, expenses and attorney fees.

Julie A. Verardo, Plaintiff

Randall G. Vaughan

Pray, Verardo, Jackman, Williamson and Marlar

900 Oneok Plaza

100 West Fifth Street

Tulsa, Oklahoma 74103

Attorney for Plaintiff

5

Charles S. Plumb, OBA No. 719

Charles S. Plumb, OBA No. 7194
Audra K. Hamilton, OBA No. 17872
Doerner, Saunders, Daniel and
Anderson
320 South Boston Avenue
Suite 500
Tulsa, Oklahoma 74103-3725
(918) 582-1211, FAX: (918) 591-5362

ADAMS AND ASSOCIATES, INC.

Attorneys for Defendant

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

MAY 2 4 2000

Phil	Lombardi, Clerk DISTRICT COURT	-
U.S.	DISTRICT COURT	

MARTIN AND ASSOCIATES, P.C.; and JIM GRIFFIN, CIVIL CASE NO. Plaintiffs, 00CV0088B (E) ٧. ENTERED ON DOCKET THE DEPARTMENT OF HEALTH AND HUMAN SERVICES.

STIPULATION OF DISMISSAL WITH PREJUDICE

Defendant.

Pursuant to Fed.R.Civ.P Rule 41(a) the Defendant United States of America acting on behalf of The Department of Health and Human Services (hereinafter "the United States"), by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Phil Pinnell, Assistant United States Attorney and the Plaintiffs Martin & Associates, P.C. and Jim Griffin, by and through their counsel hereby stipulate to the dismissal of the above styled case with prejudice. It is further agreed and stipulated that the Parties will pay their own costs, expenses and attorney fees associated with this litigation.

PHIL PINNELL, OBA #7169

Assistant United States Attorney 333 West Fourth Street, Ste. 3460

Tulsa, OK 74103-3880

918-581-7463 (Telephone)

918-581-7675 (Facsimile)

Attorneys for the Defendant

Charles W. Prather, OBA #727 403 South Cheyenne Avenue

Penthouse Suite

Tulsa, OK 74103-3880

918-587-9000 (Telephone)

918-587-8711 (Facsimile)

Attorney for the Plaintiffs

Charles S. Plumb. OBA No. 7194 Audra K. Hamilton, OBA No. 17872 Doerner, Saunders, Daniel and

Anderson

320 South Boston Avenue Suite 500

Tulsa, Oklahoma 74103-3725

(918) 582-1211, FAX: (918) 591-5362

ADAMS AND ASSOCIATES, INC.

Attorneys for Defendant

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

F	I	L	E	D
D.		•		11

WAYNE CLAYBOURNE,)	U.S. DISTRICT COURT
Plaintiff,)	·
v.)	No. 98-CV-0511-B (E)
CRAFT ASSOCIATES, INC.)	ENTERED ON DOCKET
Defendant.)	DATE MAY 2 4 2000

ORDER

The Motion for Summary Judgment Pursuant to Fed.R.Civ.P. 56 of the Defendant, Craft Associates, Inc. ("Craft") (Docket #16), is again before the Court for decision. The undisputed facts reveal that Plaintiff, Wayne Claybourne ("Claybourne"), was employed by Craft for approximately 30 years. Since January 1, 1975, Claybourne worked as a commission salesman under a written employment contract dated January 1, 1975, and amended September 14, 1990, and October 12, 1993, which provides in pertinent part:

> "For all services rendered by employee under this agreement, the company shall pay to the employee an amount equal to 75% of the gross commission revenue attributable to orders placed by the employee with customers in the employee's assigned area, as hereinafter defined. Such compensation shall be payable monthly based upon commission revenues actually received by the company from its principals during the immediately preceding month...."

The amendment to the employment agreement dated October 12, 1993, signed by both Craft and Claybourne, set out the names of specific assigned customers to which



Claybourne had exclusive right to represent and to call on and receive his share of the commission after Craft had actually been paid the full commission.

Starting in the summer of 1997, Claybourne claimed he was owed sales commissions and wanted an accounting. Craft investigated and offered Claybourne access to its accounting books and records so Claybourne and/or his accountant could satisfy themselves as to proper payment of Claybourne's commissions. Claybourne, however, did not choose to review these records until December 7, 1998, after filing a lawsuit in the Oklahoma state court.

Plaintiff claims in excess of \$100,000.00 in unpaid commissions are due. Since the commencement of this case, Craft has reviewed its records thoroughly and concluded it underpaid Claybourne \$491.77, which has been tendered without prejudice to Claybourne. Craft states Plaintiff has been paid all other commissions due and no other money is owed Claybourne by Craft.

Summary Judgment Standard

Summary judgment pursuant to Fed.R.Civ.P. 56 is appropriate where "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986); *Windon Third Oil & Gas v. FDIC*, 805 F.2d 342 (10th Cir. 1986). In *Celotex*, the court stated:

The plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon

motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.

477 U.S. at 317 (1986). To survive a motion for summary judgment, nonmovant "must establish that there is a genuine issue of material facts..." Nonmovant "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita v. Zenith*, 475 U.S. 574, 585 (1986). The evidence and inferences therefrom must be viewed in a light most favorable to the nonmoving party. *Conaway v. Smith*, 853 F.2d 789, 792 n. 4 (10th Cir. 1988). Unless the Defendants can demonstrate their entitlement beyond a reasonable doubt, summary judgment must be denied. *Norton v. Liddel*, 620 F.2d 1375, 1381 (10th Cir. 1980).

The Tenth Circuit Court of Appeals stated:

Summary judgment is appropriate if "there is no genuine issue as to any material fact and ... the moving party is entitled to a judgment as a matter of law." ... Factual disputes about immaterial matters are irrelevant to a summary judgment determination ... We view the evidence in a light most favorable to the nonmovant; however, it is not enough that the nonmovant's evidence be "merely colorable" or anything short of "significantly probative."

. . .

A movant is not required to provide evidence negating an opponent's claim . . . [r]ather, the burden is on the nonmovant, who "must present affirmative evidence in order to defeat a properly supported motion for summary judgment." . . . After the nonmovant has had a full opportunity to conduct discovery, this burden falls on the nonmovant even though the evidence

probably is in possession of the movant. (Citations omitted.)

Committee for the First Amendment v. Campbell, 962 F.2d 1517, 1521 (10th Cir. 1992).

As this matter is in the nature of a document-oriented accounting, at the hearing on

December 9, 1999, the following dialogue and directive to the parties occurred:

At page 37, line 7

THE COURT:

All right. By Wednesday, February the 9th, Mr. Hickman, you submit the breakout that I'm talking about that you have been able to tie in, to establish from some records that there were completed sales to which Mr. Claybourne is entitled to a commission where the money was actually received by Craft for which Mr. Claybourne was never paid. ... of the ones you do want to pursue, break it out specifically as to the sale, the amount due, and your evidence has got to show that the money went into the pockets of Craft, and Craft didn't pay Claybourne, Claybourne was entitled to a commission on those sums.

Then once you've provided that to Craft, I'll give Craft—what will be 20 days, Howard, after that?

At page 38, line 22:

MR. MORGAN:

On the Plaintiff's submission to Craft, that is to include documentation, it's not just a summary but actual documentation that would give us a trail to follow?

THE COURT:

That should be the case to be able to, either by your own records show that you

got the money, or by the records of the customer and/or principal to indicate that it got back into Craft, with the understanding that it also has to be able to establish that it was a commission or a sale upon which Mr. Claybourne was entitled to a commission. We need that. And since there are obviously numerous other commission representatives, it needs to be established with sufficient clarity that it could go to the jury in a chain that it was money from the customer to the principal to Craft upon which Mr. Claybourne was entitled to a commission. Otherwise it's speculative and guesswork, and we don't permit the jury to do that.

Anything else?

MR. SKOLLER:

Your Honor, as I understand it, that is to be broken down by order, by identifying the customer, the principal and the specific date and the amount of the transaction?

THE COURT:

That is correct.

In his filing on February 9, 2000, Plaintiff, Claybourne, did precisely what the Court directed him not to do. He filed a "Summary of Monies Due Plaintiff" without any supporting documentation. Claybourne provided no document trail to support each sale made, to whom, amount, and the commission amount actually paid to Craft from which Claybourne's percentage of the commission would be computed.

In response, Defendant urged that Plaintiff had wholly failed to comply with the Court's directive and also attached detailed documentation refuting each item in Plaintiff's

"Summary." Then Plaintiff replied to Defendant's response with Plaintiff's paragraph Items 2 through 11, as alleged matters in dispute. Defendant's documented response and reply is under oath as is Plaintiff's reply to Defendant's response. The documents provided concerning Plaintiff's Items 2 through 11 reflect the following:

- 2. Item 2 concerns Interstate Forge (Interstate Forging/KF Industries) invoices numbered 5033.01 and 5033.02. Plaintiff asserts the commission payment was taken away by a later adjustment. The adjustment was to correct an erroneous date entry only and the documentation supports Plaintiff was paid his commission share. (See Supplemental Affidavit No. 3 of Robert G. Luce, and Exhibit B: Analysis, attached to Defendant's response to Plaintiff's 3-10-00 reply);
- 3. Items 3-4-5-6-7- and 8 concern the Smith International account either in Houston, Texas, or Ponca City, Oklahoma. Confusion in the record exists whether the Smith International account in Ponca City, Oklahoma or Houston, Texas, was exclusively that of Claybourne, another sales person, or was to be shared in some fashion. There is also confusion concerning what constitutes a tool for purposes of nonpayment of a commission. Regarding Plaintiff's Items 3 through 8, material fact questions remain about payment of the Smith International account commissions. (Exhibit "C" to Plaintiff's reply to Defendant's response; Exhibit B1.g to Defendant's response to Plaintiff's 3-10-00 reply; Exhibit "B", pages 2-3, Defendant Item II, Defendant's Response to Plaintiff's 3-10-00 reply, and Exhibit A-1, Defendant's response to Plaintiff's 3-10-00 reply.);
- 4. Item 9 concerns Southern Tool and Plaintiff asserts the commission payment was taken away by a later adjustment. The adjustment was to correct an erroneous date entry only and the documentation supports Plaintiff was paid his commission share. (Defendant's Item VIII to Defendant's response to Plaintiff's 3-10-00 reply. The Plaintiff was paid his commission share regarding Item 9;
- 5. Concerning Plaintiff's Items 10 and 11, records provided by the Defendant reflect that Plaintiff was paid his commission owed in reference to the FRISA matter. (See Supplemental Luce Affidavit No. 3, and Defendant's IX and X attached to Defendant's response to Plaintiff's 3-10-00 reply.

In conclusion, no material issue of fact remains regarding Plaintiff's Items 2 (Interstate Forging/KF Industries), 9 (Southern Tool), and 10 and 11 (FRISA) and partial summary judgment pursuant to Fed.R.Civ.P. 56 is hereby granted concerning same. Further, material issues of fact remain regarding Plaintiff's Items 3 through 8, concerning alleged nonpayment of Smith International commissions. Thus, remaining for jury trial is the dispute regarding Plaintiff's Items 3 through 8, all pertaining to alleged failure to pay commissions due regarding the Smith International account.¹

The following pretrial schedule shall be applicable herein:

July 3, 2000

Filing of motions in limine;

July 7, 2000

Final pretrial conference at 10.00 o'clock A.M.

July 10, 2000

Final pretrial order, requested voir dire, requested instructions, and any trial brief

a party wishes to file;

July 17, 2000

Jury trial at 9:30 A.M.

DATED this

day of May, 2000.

THOMAS R. BRETT

UNITED STATES DISTRICT JUDGE

¹In Plaintiff's sworn statement attached to Plaintiff's reply to Defendant's response filed 3-10-00, paragraph 4, page 2, Plaintiff states: "A large part of the dispute herein relates to Smith International.

8

FILED

IN THE UNITED STATES DISTRICT COURT FOR THE MAY 2 2 2000 NORTHERN DISTRICT OF OKLAHOMA

Phil Lombardi, Clerk U.S. DISTRICT COURT

JANET K. HAYWORTH,)
Plaintiff,	· /
vs.) Case No. 00CV0281K(J)
BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY, a foreign corporation, and BOYD L. SWAGER,	ENTERED ON DOCKET DATE MAY 2 3 2000
Defendants.)

DISMISSAL OF CROSS-PETITION WITHOUT PREJUDICE

COMES NOW the BURLINGTON NORTHERN AND SANTA FE RAILWAY

COMPANY, Defendant herein, and advises the Court that the Cross-petition filed by this

defendant has never been served upon the defendant Boyd L. Swager. This Defendant believers
that the Cross-petition is moot and hereby dismisses said Cross-petition without prejudice.

WHEREFORE Defendant BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY hereby dismisses without prejudice the Cross-petition filed against the defendant Boyd L. Swager.

Respectfully submitted,

A. Camp Bonds, Jr., OBA #944

Juliet N. Brennan, OBA #12149

BONDS, MATTHEWS, BONDS & HAYES

P.O. Box 1906 — 444 Court Street

Muskogee, OK 74402-1906

918/683-2911 (Telephone)

918/687-0846 (Facsimile)

Counsel for Defendant, Burlington Northern and

Santa Fe Railway Company

CERTIFICATE OF MAILING

I hereby certify that on this day of May, 2000, I deposited in the U.S. Mail, with proper postage fully pre-paid thereon, a true and correct copy of the above document to:

James E. Frasier George M. Miles 1700 Southwest Blvd. P.O. Box 799 Tulsa, OK 74101-0779

Acel

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

T. I	
MAY 2	Livia Mr
Phil Lo U.S. District	1 Count

GREGORY DALE ENGLISH,)	Phil Lo U.S. DISTANDE COUR
Petitioner,)	
vs.) Case No. 9	5-CV-753-B
R. MICHAEL CODY,)	
Respondent.)	ENTERED ON DOCKET MAY 23. 2000 DATE
	<u>ORDER</u>	DATE -

This is a proceeding on a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner, appearing pro se, is currently confined in the Oklahoma Department of Corrections. He challenges his convictions entered in Tulsa County District Court, Case Nos. CRF-88-2553 and CRF-88-2554, asserting three (3) grounds of error. Based on the record before the Court, and as more fully set out below, the Court concludes that this petition should be denied.

BACKGROUND

Petitioner, represented at trial by retained counsel, Jim Heslet, was convicted by a jury of two counts of Robbery with Firearms, After Former Conviction of Three or More Felonies in Tulsa County District Court, Case Nos. CF-88-2553 and CF-88-2554, and received a 215 year sentence on each count, to be served consecutively. Petitioner appealed the convictions and sentences. On direct appeal, Petitioner, represented by Gloyd McCoy, an attorney with the Appellate Indigent Defender's Office, raised the following issues:

Mr. English was denied his sixth amendment right to confrontation by the 1. introduction of the guilty plea transcript of Raymond Tillman.

- 2. Tillman's repeated assertions of his privilege against self-incrimination and the state's reference to this were prejudicial to Mr. English.
- 3. The prosecutor improperly vouched for the credibility of the state's witnesses.
- 4. The sentences imposed are excessive.

(#4, Ex. A). On January 13, 1993, the Oklahoma Court of Criminal Appeals affirmed the judgment and sentence in an unpublished summary opinion (#4, Ex. C). Petitioner, appearing *pro se*, filed a petition for rehearing, arguing that the appellate court's opinion "overlooked a question decisive of the case," i.e., the issue raised in <u>United States v. Gomez-Lemos</u>, 939 F.2d 326, 333-34 (6th Cir. 1991), and that both his trial and appellate counsel provided ineffective assistance of counsel in failing to argue the issue (#4, Ex. D). On March 17, 1993, the Court of Criminal Appeals denied the petition for rehearing after considering the merits of Petitioner's claims (#4, Ex. E).

On April 4, 1995, Petitioner, appearing *pro se*, filed an application for post-conviction relief in the trial court, raising the following grounds for relief:

- 1. The trial court's admission of uncross-examined plea of guilty trial transcript testimony of alleged co-conspirator who refused to testify at trial, under unavailability of witness rule, violated the confrontation clause, warranting a reversal of Mr. English's convictions and sentences for a new trial. (citations omitted).
- 2. Failure of appellant's trial attorney, Mr. Jim Heslet to object to the <u>U.S. v. Gomez-Lemos</u>, 939 F.2d 326 (6th Cir. 1991) -- <u>Douglas v. Alabama</u>, 380 U.S. 415 (1965) progeny claims/violation in the case at bar and to preserve that error for purpose of direct appeal denied appellant English effective assistance of both trial and appellate counsel under <u>Brecheen v. Reynolds</u>, 41 F.3d 1343, 1363-1366 (10th Cir. 1994) progeny.
- 3. Unnecessarily suggestive pretrial photo identification procedures denied defendant-appellant English due process (citations omitted) warranting a new trial.
- 4. Failure of the appellant's trial attorney, Mr. Jim Heslet to object to the <u>Simmons v. U.S.</u> progeny violations . . . and to preserve and raise that error on direct appeal denied appellant English effective assistance of both trial and appellate counsel.

On May 5, 1995, the trial court denied post-conviction relief finding that the issues either had been raised on direct appeal and were barred by *res judicata*, or could have been but were not raised on direct appeal and were waived. Petitioner appealed, arguing that his procedural default should be excused because he received ineffective assistance from his trial and appellate counsel (#4, Ex. F). The Court of Criminal Appeals concluded that the only issue raised by Petitioner which was not or could not have been raised in his direct appeal was his claim that he had been deprived of effective assistance of appellate counsel. The appellate court further found that based upon the record, Petitioner's appellate counsel did not provide ineffective assistance. As a result, on June 21, 1995, the Court of Criminal Appeals affirmed the trial court's denial of post-conviction relief (#4, Ex. G).

Petitioner filed the instant petition for writ of habeas corpus on August 8, 1995, alleging that:

- 1. Petitioner's convictions and sentences are in direct violation of <u>Idaho v. Wright</u>; <u>Lee v. Illinois</u>; <u>Douglas v. Alabama</u> and specifically <u>U.S. v. Gomez-Lemos</u>, 939 F.2d 326 (6th Cir. 1991);
- 2. Ineffective assistance of both trial and appellate counsel under <u>Brecheen v. Reynolds</u>, 41 F.3d 1343, 1363-1366 (10th Cir. 1994) and <u>U.S. v. Galloway</u>, 56 F.3d 1239 (10th Cir. 1995);
- 3. Unnecessarily suggestive pretrial photo I.D. procedures and failure of trial attorney to object to this <u>Simmons v. U.S.</u> claim in the case at bar violated the 6th and 14th Amendments to the United States Constitution.
- (#1). Respondent filed a Rule 5 response, stating that Petitioner had exhausted his state remedies and arguing that Petitioner's claims were procedurally barred (#4). Petitioner filed a reply (#5). On August 22, 1996, this Court entered its Order (#11) finding that Petitioner's ineffective assistance of trial counsel claim was not procedurally barred and directing Respondent to address the claim on the merits. Respondent requested permission to appeal pursuant to 28 U.S.C. § 1292(b). The Court granted Respondent's request. On June 30, 1998, after considering Respondent's interlocutory

appeal, the Tenth Circuit Court of Appeals defined the conditions requiring a district court to impose a procedural bar on ineffective assistance of trial counsel claims and remanded the issue in this case for further review consistent with its findings (#23). On July 29, 1998, the Court directed the parties to address the considerations relevant to the ineffective assistance of trial counsel/procedural bar issue (#24). Respondent submitted a supplemental brief in compliance with the Court's directive (#25). However, and in spite of being afforded a second opportunity to brief the issues (see September 8, 1998 Order (#27)), Petitioner did not submit a brief as directed by the Court.

On January 28, 1999, the Court found Petitioner's confrontation clause claim was not procedurally barred and directed Respondent to brief the claim on the merits (#30). Petitioner was advised that he could submit a reply to Respondent's brief. On February 10, 1999, Respondent complied with the Court's Order by filing a supplemental response addressing Petitioner's confrontation clause claim (#31). Petitioner did not file a reply to Respondent's supplemental response.

On May 4, 1999, the Court entered its Order denying the petition for writ of habeas corpus. The Court also entered Judgment in favor of Respondent. Thereafter, Petitioner filed his motion to vacate judgment, requesting that the case be reopened so that he could file a response as directed in the May 20, 1999 Order. Petitioner explained that he had assumed, erroneously, that his counsel who had been appointed for purposes of the interlocutory appeal would continue his representation upon remand to the district court. By Order entered May 21, 1999, the Court vacated its May 4, 1999 Order and Judgment and directed Petitioner to file his response by June 21, 1999. After his deadline was extended to July 21, 1999, Petitioner filed his response on July 29, 1999 (#39).

ANALYSIS

A. Applicability of the Antiterrorism and Effective Death Penalty Act

Petitioner filed his habeas corpus petition on August 8, 1995, prior to the April 24, 1996 enactment of the Antiterrorism and Effective Death Penalty Act ("AEDPA"). Because this action was pending when the AEDPA was enacted, pre-AEDPA law will be applied to Petitioner's claims. See Lindh v. Murphy, 521 U.S. 320, 117 S.Ct 2059, 2068 (1997). In analyzing the AEDPA's impact on the deference owed to a state court's resolution of questions of constitutional law, Justice O'Connor recently wrote that prior to the 1996 enactment of the AEDPA, a federal court was obligated to "exercise its independent judgment when deciding both questions of constitutional law and mixed constitutional questions (i.e., application of constitutional law to fact)." Williams v. Taylor, --- U.S. ---, 120 S.Ct. 1495, 1516 (2000) (citing Miller v. Fenton, 474 U.S. 104, 112 (1985)). Thus, this Court reviews issues of law and issues of mixed law and fact de novo under pre-AEDPA standards. See Wright v. West, 505 U.S. 277, 300-301 (1992) (White, J., concurring). In contrast, a determination by a state court of competent jurisdiction after a hearing on the merits of a factual issue will be presumed to be correct, unless the petitioner demonstrates that the state courts failed to resolve the claims on the merits. Id. at 300-306; Ramirez v. Rodriguez, 467 F.2d 822 (10th Cir. 1972).

B. Exhaustion/Evidentiary Hearing

The Court must determine whether Petitioner meets the exhaustion requirements of 28 U.S.C. § 2254(b). See Rose v. Lundy, 455 U.S. 509, 510 (1982). Respondent concedes, and this Court finds, that the Petitioner meets the exhaustion requirements under the law.

The Court also finds that an evidentiary hearing is not necessary as the issues can be resolved

on the basis of the record. See <u>Townsend v. Sain</u>, 372 U.S. 293, 318 (1963), overruled in part on other grounds, <u>Keeney v. Tamayo-Reyes</u>, 504 U.S. 1 (1992). The granting of such a hearing is within the discretion of the district court, and this Court finds that a hearing is not necessary.

C. Petitioner's claims

The Court will consider each of Petitioner's claims, in the order presented by Petitioner in his petition:

1. Confrontation Clause Claim

On direct appeal, Petitioner's counsel argued that Petitioner was denied his 6th Amendment right to confrontation by the introduction of the guilty plea transcript of co-defendant Raymond Tillman. This claim was considered on the merits and rejected by the Oklahoma Court of Criminal Appeals in its summary opinion affirming Petitioner's convictions and sentences. As stated above, Respondent initially argued that this claim is procedurally barred, but the Court has found Petitioner "fairly presented" this claim to the Oklahoma Court of Criminal Appeals on direct appeal. Therefore, this Court is not precluded from considering the merits of this claim.

Petitioner argues that the admission of his co-defendant's guilty plea testimony at Petitioner's trial violated his Sixth Amendment right to confront and cross-examine his accuser. The Supreme Court has held that to protect a criminal defendant's Sixth Amendment and Fourteenth Amendment right to confront witnesses, hearsay evidence will be admitted against a defendant only if the government shows (1) that the witness is unavailable and (2) that the statement bears sufficient indicia of reliability. Jennings v. Maynard, 946 F.2d 1502, 1504-05 (10th Cir. 1991) (citing Ohio v. Roberts, 448 U.S. 56, 65-66 (1980)). "[T]he veracity of hearsay statements is sufficiently dependable to allow the untested admission of such statements against an accused when (1) 'the

evidence falls within a firmly rooted hearsay exception' or (2) it contains 'particularized guarantees of trustworthiness' such that adversarial testing would be expected to add little, if anything, to the statements' reliability." <u>Lilly v. Virginia</u>, 527 U.S. 116, 124-25 (1999) (citing <u>Roberts</u>, 448 U.S. at 66).

In the instant case, the hearsay statement admitted by the trial court was the testimony of Petitioner's former co-defendant, Raymond Tillman, entered by Tillman under oath at his guilty plea hearing. The transcript from the guilty plea hearing, as read into the record at Petitioner's trial (Trans. at 209), indicated that those present at the hearing were Tillman, his attorney, and the attorney representing the State. Nothing indicates that Tillman was subject to cross-examination when he entered his plea. The portion of the transcript read into the record included Tillman's testimony that he drove Petitioner to and from the site of the robbery while Petitioner was the planner of the robbery as well as the gunman who entered the store and took the money. In the instant action, Petitioner challenges both that witness Tillman was unavailable to testify (#39 at 12)¹ and that Tillman's guilty plea bore sufficient indicia of reliability to warrant reading of the transcript into evidence (#39 at 13).

In his supplemental response (#31), Respondent emphasizes that when Tillman entered his guilty plea under oath, he did not exonerate himself and implicate Petitioner. Rather, he clearly subjected himself to criminal liability by admitting his role in the crime. Furthermore, Respondent argues that the testimony at issue in this case is distinguishable from the admissions at issue in <u>Lee</u>

¹Although Petitioner states that he challenges the trial court's finding of unavailability, he never actually explains the basis for his challenge. As recognized by Petitioner, his co-defendant invoked the Fifth Amendment not once but four times in front of the jury when he was called to testify. Petitioner offers no explanation for his contention that the trial court's finding of unavailability was error of a constitutional magnitude.

v. Illinois, 476 U.S. 530 (1986), and <u>Douglas v. Alabama</u>, 380 U.S. 415 (1965). In those cases, the co-defendants' admissions were custodial confessions given to police authorities, in contrast to Tillman's admission given under oath in the formal setting of a courtroom. Under the circumstances present in this case, Respondent argues that the reliability of Tillman's statement is inferred and that the admission of the evidence did not violate the Confrontation Clause.

In contrast, Petitioner asserts that "the admission of alleged co-defendant Tillman's guilty plea transcript at Petitioner's trial was void of any indica (sic) of reliability." (#39 at 13). According to Petitioner, Tillman refused to testify because he "was hideing (sic) the fact that his guilty plea had been negotiated with a stipulation that he implicate the petitioner; and that had he testified, and exonerated petitioner, he would have voided his plea agreement." (Id.)

After reviewing the record, the Court finds that although Tillman's testimony was under oath, he nonetheless inculpated Petitioner with the more serious role as the armed robber while confessing only that he drove the car to and from the robbery site. Thus, although the testimony was entered under oath, it nonetheless increases Petitioner's role in the crime while lessening the role of the declarant. Under these facts, the Court finds that the guilty plea testimony of Petitioner's codefendant was not "accompanied by particularized guarantees of trustworthiness" and its admission at Petitioner's trial violated the Confrontation Clause.

However, after finding that the admission of the plea hearing testimony violated the Confrontation Clause, the Court nonetheless concludes that the error was harmless in that it did not have a "substantial and injurious effect or influence in determining the jury's verdict." See Brecht v. Abrahamson, 507 U.S. 619 (1993) (finding that the standard established by Kotteakos v. United States, 328 U.S. 750 (1946), should be used to resolve harmless error issues). In conducting a

harmless error analysis, the Court does not determine whether the evidence is sufficient to support Petitioner's conviction in the absence of the inadmissible hearsay. See Tuttle v. Utah, 57 F.3d 879, 884 (10th Cir. 1995). Instead, the Court must determine, in light of the entire record, "whether [the hearsay] evidence so influenced the jury that we cannot conclude that it did not substantially affect the verdict, or whether we have grave doubt as to the harmlessness of the errors alleged." Id. The state's case against Petitioner was not based on circumstantial evidence. Two eyewitnesses to the robbery identified Petitioner as the person in the store with a gun who committed the crime (#29, Tr. Trans. at 136, 173). One of the witnesses stated he was "100 percent certain" of Petitioner's identity (#29, Tr. Trans. at 175). These eyewitness identifications remained unrebutted in the evidence. Thus, evidence of Petitioner's guilt was substantial and the evidence admitted in the form of Tillman's testimony at his guilty plea hearing was cumulative. After reviewing the entire trial transcript, the Court concludes that although the admission of Tillman's testimony violated the Confrontation Clause, the error was harmless. Habeas corpus relief on Petitioner's first claim is denied.

2. Ineffective Assistance of Counsel Claims

(a) Ineffective assistance of trial counsel claim is procedurally barred

Petitioner argues that his trial counsel provided ineffective assistance of counsel when he failed to object to the pretrial photographic lineup procedures and failed to object adequately to the trial court's admission of Raymond Tillman's testimony entered at Tillman's guilty plea hearing. Respondent asserts that this claim is procedurally barred from federal habeas corpus review due to Petitioner's procedural default of the claim in state court.

The doctrine of procedural default generally prohibits a federal court from considering a

specific habeas claim where the state's highest court declined to reach the merits of that claim on independent and adequate state procedural grounds, unless a petitioner "demonstrate[s] cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate[s] that failure to consider the claim[] will result in a fundamental miscarriage of justice." Coleman v. Thompson, 501 U.S. 722, 724 (1991); see also Maes v. Thomas, 46 F.3d 979, 985 (10th Cir.); Gilbert v. Scott, 941 F.2d 1065, 1067-68 (10th Cir. 1991). "A state court finding of procedural default is independent if it is separate and distinct from federal law." Maes, 46 F.3d at 985. A finding of procedural default is an adequate state ground if it has been applied evenhandedly "in the vast majority of cases." Id. (quoting Andrews v. Deland, 943 F.2d 1162, 1190 (10th Cir. 1991)).

Ineffective assistance of trial counsel claims raise special concerns in the procedural bar context. The Tenth Circuit Court of Appeals has recognized that countervailing concerns justify an exception to the general rule. Brecheen v. Reynolds, 41 F.3d 1343, 1363 (10th Cir. 1994) (citing Kimmelman v. Morrison, 477 U.S. 365 (1986)). The unique concerns are "dictated by the interplay of two factors: the need for additional fact-finding, along with the need to permit the petitioner to consult with separate counsel on appeal in order to obtain an objective assessment as to trial counsel's performance." Id. at 1364 (citing Osborn v. Shillinger, 861 F.2d 612, 623 (10th Cir. 1988)). In considering the interlocutory appeal filed in the instant case, the Tenth Circuit explicitly narrowed the circumstances requiring imposition of a procedural bar on ineffective assistance of counsel claims first raised collaterally. English v. Cody, 146 F.3d 1257 (10th Cir. 1998). The circuit court concluded that:

<u>Kimmelman</u>, <u>Osborn</u>, and <u>Brecheen</u> indicate that the Oklahoma bar will apply in those limited cases meeting the following two conditions: trial and appellate counsel differ; and the ineffectiveness claim can be resolved upon the trial record alone. All

other ineffectiveness claims are procedurally barred only if Oklahoma's special appellate remand rule for ineffectiveness claims is adequately and evenhandedly applied.

Id. at 1264 (citation omitted).

Applying these principles to this case on remand, the Court concludes Petitioner's ineffective assistance of trial counsel claim is barred by the procedural default doctrine. Petitioner was represented by separate counsel at trial and on direct appeal. Furthermore, Petitioner's allegations of ineffective assistance of trial counsel based on counsel's failure to object both to the pretrial lineup procedure as well as to the confrontation clause issue embrace matters in the trial record. As a result, no further fact-finding was necessary in order for the issue to be developed and raised on direct appeal. Therefore, the Court finds that in this case the procedural bar imposed by the state appellate court was based on an adequate ground.²

Because of his procedural default, this Court may not consider Petitioner's ineffective assistance of trial counsel claim unless he is able to show cause and prejudice for the default, or demonstrate that a fundamental miscarriage of justice would result if his claim is not considered.

See Coleman, 510 U.S. at 750. The cause standard requires a petitioner to "show that some objective factor external to the defense impeded . . . efforts to comply with the state procedural rules." Murray v. Carrier, 477 U.S. 478, 488 (1986). Examples of such external factors include the discovery of new evidence, a change in the law, and interference by state officials. Id. As for prejudice, a petitioner must show "actual prejudice' resulting from the errors of which he complains." United States v. Frady, 456 U.S. 152, 168 (1982). A "fundamental miscarriage of justice" instead requires

²As a result of this finding, the Court need not evaluate in this case the adequacy of Oklahoma's remand procedure. See English v. Cody, 146 F.3d 1257, 1264-65 (10th Cir. 1998).

a petitioner to demonstrate that he is "actually innocent" of the crime of which he was convicted.

McCleskey v. Zant, 499 U.S. 467, 494 (1991).

Petitioner attempts to show cause by alleging that his appellate counsel provided ineffective assistance of counsel in failing to raise a claim of ineffective assistance of trial counsel on direct appeal. To establish "cause" via an ineffective assistance of appellate counsel claim, Petitioner must satisfy the standard enunciated in Strickland v. Washington, 466 U.S. 668 (1984). See Murray v. Carrier, 477 U.S. 478, 488-89 (1986); United States v. Cook, 45 F.3d 388, 394-95 (10th Cir. 1995). The Strickland test requires a showing of both deficient performance by appellate counsel and prejudice to Petitioner as a result of the deficient performance. 466 U.S. at 687. To satisfy the deficient performance prong of the test, Petitioner must overcome a strong presumption that counsel's conduct fell within the "wide range of reasonable professional assistance [that] . . . might be considered sound trial strategy." Brecheen, 41 F.3d 1365 (citations omitted). "A claim of ineffective assistance must be reviewed from the perspective of counsel at the time and therefore may not be predicated on the distorting effects of hindsight." Id. (citations omitted). Finally, the focus of the first prong is "not what is prudent or appropriate, but only what is constitutionally compelled." Id. To establish the prejudice prong of the test, Petitioner must show that the allegedly deficient performance prejudiced the defense; namely, "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different." Strickland, 466 U.S. at 694. Failure to establish either prong of the Strickland standard will result in denial of relief. Id. at 696.

In the instant case, without addressing the first prong of the <u>Strickland</u> test, this Court finds appellate counsel's failure to raise the ineffective assistance of trial counsel claim was not ineffective

assistance because Petitioner cannot demonstrate that he was prejudiced by his appellate counsel's failure to raise the ineffective assistance of trial counsel claim on direct appeal. As discussed above, evidence of Petitioner's guilt was overwhelming and the failure of trial counsel to object to the pretrial lineup procedure and to object adequately to the introduction of co-defendant Tillman's plea hearing testimony did not prejudice Petitioner. As a result, Petitioner has not demonstrated that but for appellate counsel's failure to raise the claim on direct appeal, the result of the appeal would have been different. Petitioner has failed to demonstrate "cause" sufficient to overcome his procedural default of his ineffective assistance of trial counsel claim.

Petitioner's only other means of gaining federal habeas review is a claim of actual innocence under the fundamental miscarriage of justice exception. Herrera v. Collins, 506 U.S. 390, 403-404 (1993); Sawyer v. Whitley, 505 U.S. 333, 339-341 (1992). Petitioner, however, does not claim that he is actually innocent of the crime for which he was convicted. Therefore, Petitioner's claim of ineffective assistance of trial counsel is procedurally barred and is denied on that basis.

(b) Ineffective assistance of appellate counsel claim lacks merit

In affirming the state trial court's denial of post-conviction relief, the Oklahoma Court of Criminal Appeals considered Petitioner's claim of ineffective assistance of appellate counsel on the merits. That court found that "[b]ased upon the record before this Court, the evidence indicates that Petitioner was not deprived of effective assistance of appellate counsel and is not entitled to post-conviction relief." (#4, Ex. G at 2).

As discussed above, Petitioner must satisfy both prongs of the two-prong standard enunciated in Strickland, 466 U.S. 668, to succeed on an ineffective assistance of appellate counsel claim. Petitioner argues that appellate counsel provided ineffective assistance by failing to cite <u>United</u>

States v. Gomez-Lemos, 939 F.2d 326 (6th Cir. 1991) in support of his Confrontation Clause claim. However, the Court has found, in Part A above, that although the introduction of Tillman's guilty plea testimony violated the Confrontation Clause, the error was harmless. As a result, Petitioner cannot satisfy either the performance or the prejudice prong of the Strickland test. Appellate counsel's failure to include the citation to the Gomez-Lemos case cannot be viewed as ineffective assistance of counsel. Petitioner's request for habeas corpus relief on this ground is denied.

3. Challenge to photo I.D. procedures

Petitioner claims that unnecessarily suggestive pretrial photo identification procedures used by the Tulsa Police constituted a denial of due process. Petitioner first raised this claim in his application for post-conviction relief, having failed to raise it on direct appeal. Citing Robison v. State, 818 P.2d 1250 (Okla. Crim. App. 1991) and Okla. Stat. tit. 22, § 1086, the Oklahoma Court of Criminal Appeals imposed a procedural bar on this claim, finding that the claim could have been but was not raised on direct appeal.

The state court's procedural bar as applied to Petitioner's claim was an "independent" state ground because "it was the exclusive basis for the state court's holding." Maes, 46 F.3d at 985. Additionally, the procedural bar was an "adequate" state ground because the Oklahoma Court of Criminal Appeals has consistently declined to review claims which were not but could have been raised on direct appeal. Okla. Stat. tit. 22, § 1086. Therefore, the Court finds that this claim is procedurally barred from federal habeas corpus review unless Petitioner demonstrates cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrates that failure to consider the claim will result in a fundamental miscarriage of justice.

Petitioner argues that appellate counsel's failure to raise this claim on direct appeal constitutes "cause" to excuse his procedural default. However, as discussed above, Petitioner has failed in this case to demonstrate that had appellate counsel raised the issue of the pretrial photographic lineup the results of the appeal would have been different. Strickland, 466 U.S. at 694. Therefore, appellate counsel did not provide ineffective assistance in failing to raise this claim on direct appeal and Petitioner has not shown cause to excuse his procedural default. In addition, Petitioner does not argue that he is actually innocent of the underlying offense. As a result, the Court concludes that this claim is procedurally barred and is denied on that basis.

CONCLUSION

After carefully reviewing the record in this case, the Court concludes that the Petitioner has not established that he is in custody in violation of the Constitution or laws of the United States.

ACCORDINGLY, IT IS HEREBY ORDERED that the petition for a writ of habeas corpus is denied.

SO ORDERED THIS 22 day of ____

, 2000.

THOMAS R. BRETT, Senior Judge

UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

MAY 2 2 2000 //V Phil Lombardi, Clerk

GREGORY DALE ENGLISH,	U.S. DISTRICT C
Petitioner,))
vs.) Case No. 95-CV-753-B
R. MICHAEL CODY,))
Respondent.	ENTERED ON DOCKET DATE ON DOCKET

JUDGMENT

This matter came before the Court upon Petitioner's 28 U.S.C. § 2254 petition for writ of habeas corpus. The Court duly considered the issues and rendered a decision herein.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that judgment is hereby entered for Respondent and against Petitioner.

SO ORDERED THIS 7 Aday of

2000.

THOMAS R. BRETT, Senior Judge UNITED STATES DISTRICT COURT

	N DISTRICT OF OKLAHOR	MA LL M D
DOME CORPORATION, et al.)	MAY 1 3 2000
Plaintiffs,)	Phil Lombardi, Clerk U.S. DISTRICT COURT
vs.) Case No. 96-C	CIV-0097-E /
COMPTON K. KENNARD, et al.))	
Defendants.)	ENTERED ON DOCKET
STIPULATI	ON OF DISMISSAL	MAY 23 2000

IN THE UNITED STATES DISTRICT COURT

COMES NOW the parties hereto and stipulate that the above-captioned matter may be, and is hereby, dismissed with prejudice to Plaintiff's right to refile same.

Respectfully submitted,

RHODES, HIERONYMUS, JONES, TUCKER & GABLE

un (08A#16298) for. William S. Leach, OBA #14892

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Attorney for Mary Jane Hermann, Personal

Representative of Gary Hermann

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UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

	FILE D
SALLY M. WILLING,	- P
SSN: 149-74-4456) MAY 2 2 2008 A
Plaintiff,) Phil Lombardi, Clerk U.S. DISTRICT COURT
v.) No. 99-CV-393-J
KENNETH S. APFEL, Commissioner of Social Security Administration,	ENTERED ON DOCKET
Defendant.	DATE MAY 23 2000

JUDGMENT

This action has come before the Court for consideration, and an Order affirming the Commissioner's denial of benefits to Plaintiff has been entered. Judgment for the Defendant and against the Plaintiff is hereby entered pursuant to the Court's Order.

It is so ordered this 22nd day of May 2000.

Sam A. Joyner

United States Magistrate Judge

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA FILED

SALLY M. WILLING,	MAY 2 2 2000F
SSN: 149-74-4456) Phil Lombardi, Clerk U.S. DISTRICT COURT
Plaintiff,)
v.) No. 99-CV-393-J
KENNETH S. APFEL, Commissioner of Social Security Administration,	ENTERED ON DOCKET
Defendant.	DATE MAY 23 2000

ORDER^{1/}

Plaintiff, Sally M. Willing, pursuant to 42 U.S.C. § 405(g), appeals the decision of the Commissioner denying Social Security benefits.^{2/} Plaintiff asserts that the Commissioner erred because (1) the ALJ's determination of Plaintiff's RFC was conclusory, (2) the ALJ's PRT Form findings are not supported by substantial evidence, and (3) the ALJ failed to conduct an appropriate Step Four analysis. For the reasons discussed below, the Court **AFFIRMS** the Commissioner's decision.

I. FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff testified at a hearing before the ALJ on July 8, 1997. [R. at 32]. Plaintiff stated that she was 29 years old at the time of the hearing before the ALJ, and that she was born May 12, 1968. [R. at 37]. Plaintiff completed the tenth

This Order is entered in accordance with 28 U.S.C. § 636(c) and pursuant to the parties' Consent to Proceed Before United States Magistrate Judge.

Administrative Law Judge R.J. Payne (hereafter "ALJ") concluded that Plaintiff was not disabled on September 22, 1997. [R. at 23]. Plaintiff appealed to the Appeals Council. The Appeals Council declined Plaintiff's request for review on April 19, 1999. [R. at 3].

grade. [R. at 37]. Plaintiff previously worked as a certified nurse's aide. [R. at 37].

Plaintiff testified that in 1996 she had a respiratory infection which led to a flare-up of her lupus. Plaintiff stated that she was treated at Saint Francis hospital. [R. at 39]. According to Plaintiff, Dr. Adelizzi diagnosed her with systemic lupus. [R. at 41]. Plaintiff stated that she has had five flare-ups of her lupus within the past year. Plaintiff explained that a flare-up sometimes affects her joints to the point that she cannot move, and sometimes causes her to feel as though she is suffocating. [R. at 43]. Plaintiff acknowleged that she only went to the hospital for two of her flare-ups. [R. at 44].

Plaintiff takes prednisone for her lupus. Plaintiff testified that she has some side effects from prednisone, including headaches, mood swings, and yeast infections. [R. at 47]. According to Plaintiff, she experiences pain in her joints on a daily basis due to her lupus. [R. at 48]. Plaintiff stated that her doctor recommended to her that she take two one and one-half hour naps each day. [R. at 48].

According to Plaintiff, she uses a walker at home to go to the bathroom, shower, and to get around if her husband is not at home. [R. at 50]. Plaintiff additionally testified that she saw a counselor for her mental problems. [R. at 52].

Plaintiff stated that she can usually sit for about 45 minutes to one hour. [R. at 53]. Plaintiff believes she could stand for approximately 30 minutes without support. [R. at 63]. In addition, Plaintiff stated that she could walk approximately

45 minutes. [R. at 55]. Plaintiff has difficulty lifting one gallon of milk, and therefore she purchases one-half gallon sizes. [R. at 56]. Plaintiff shops at Wal-Mart, but uses a mechanical cart when she shops. [R. at 54].

Plaintiff testified that she stopped working in 1992 to become a housewife. [R. at 61]. In 1994 Plaintiff was diagnosed with Hepatitis A. [R. at 61]. Plaintiff does not currently drive, but stated that she planned to obtain her drivers license some day. [R. at 63]. Plaintiff enjoys doing ceramics approximately one time each week for 30 - 40 minutes. [R. at 64].

Plaintiff testified that on a scale from one to ten she would consider her pain to regularly be an eight, and a ten when it is severe. [R. at 68]. Plaintiff believes that she experiences pain at the level of ten for periods of time lasting two and one-half days. [R. at 68].

A RFC completed for Plaintiff on June 14, 1996, by H. Simpkins, M.D., indicates that Plaintiff could occasionally lift 50 pounds, frequently lift 25 pounds, stand or walk approximately six hours in an eight hour day, sit approximately six hours in an eight hour day, and push or pull an unlimited amount. [R. at 81]. The doctor did note that Plaintiff should not climb ladders, ropes, or scaffolds. [R. at 82]. The assessment was affirmed as written by a second doctor. [R. at 87].

On her disability report, Plaintiff indicated that she cooked three times a day, cleaned, shopped for food, and got her children ready for school. [R. at 112]. Plaintiff wrote that her hobbies and activities included piano and crafts, and that she occasionally visited friends. [R. at 112].

A social security reviewer indicated that Plaintiff exhibited no signs of disability on December 20, 1995. [R. at 116]. In her reconsideration report, Plaintiff noted that she was unable to work because she never knew when she would have a flare-up. [R. at 117].

Plaintiff was initially examined by Raymond A. Adelizzi, D.O., on August 9, 1995. He wrote that Plaintiff complained of joint pain, wrist pain, hip pain, knee pain, and feet pain for the previous two and one-half years. [R. at 129]. He noted that Plaintiff was a healthy appearing 27-year-old. [R. at 130]. He determined Plaintiff had some mild tenderness of her joints and only questionable swelling with no other joint abnormalities. [R. at 130]. His impression was that Plaintiff had systemic lupus, and apparently had hepatitis A. [R. at 130]. On August 30, 1995, Dr. Adelizzi noted that he recommended that Plaintiff begin taking Plaquenil, but that Plaintiff must first take a baseline eye exam. [R. at 127]. On October 3, 1995, Plaintiff reported only mild joint pain. [R. at 125]. He noted that he recommended that Plaintiff begin Plaquenil, but that Plaintiff had not yet taken the eye exam and therefore could not. [R. at 125]. Plaintiff was examined by Raymond A. Adelizzi, D.O., on January 9, 1996. [R. at 123]. He noted that Plaintiff had complaints of increased joint pain which he treated with a brief trial of prednisone and that Plaintiff reported some improvement.

Dr. Alexander Uy wrote a report on May 31, 1996. [R. at 132]. He noted that he had treated Plaintiff for several years. He treated Plaintiff for several respiratory infections which were easily treated with antibiotics. He observed that Plaintiff

sometimes complained of nonspecific myalgias in her wrists, elbows, shoulders, neck, hips, fingers and toes, but that no other findings presented, and he eventually suspected a rheumatological disorder. [R. at 132]. Plaintiff was eventually diagnosed with lupus. [R. at 132]. He wrote that Plaintiff had experienced recurrent episodes of chest pain accompanied by shortness of breath since she was a teenager. [R. at 132]. He noted that Plaintiff used a walker in the morning for assistance due to general achiness. [R. at 133]. He also noted that Plaintiff was able to drive. [R. at 135]. Plaintiff's grip strength and gait were reported as normal. [R. at 135]. He described Plaintiff as currently "less symptomatic." Plaintiff was noted as having normal ranges of motion, no gross swelling, and no rheumatoid nodules. [R. at 134]. He concluded that Plaintiff had lupus with mild to moderate flare-ups which required courses of steroids, and that Plaintiff responded well. [R. at 136]. He observed that Plaintiff ambulated well in his office, but that he believed Plaintiff when she stated that she needed a walker in the morning. [R. at 136].

II. SOCIAL SECURITY LAW & STANDARD OF REVIEW

The Commissioner has established a five-step process for the evaluation of social security claims. See 20 C.F.R. § 404.1520. Disability under the Social Security Act is defined as the

inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment

42 U.S.C. § 423(d)(1)(A). A claimant is disabled under the Social Security Act only if his

physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work in the national economy. . . .

42 U.S.C. § 423(d)(2)(A).3/

The Commissioner's disability determinations are reviewed to determine (1) if the correct legal principles have been followed, and (2) if the decision is supported by substantial evidence. See 42 U.S.C. § 405(g); Bernal v. Bowen, 851 F.2d 297, 299 (10th Cir. 1988); Williams, 844 F.2d at 750.

The Court, in determining whether the decision of the Commissioner is supported by substantial evidence, does not examine the issues *de novo*. Sisco v. United States Dept. of Health and Human Services, 10 F.3d 739, 741 (10th Cir. 1993). The Court will not reweigh the evidence or substitute its judgment for that of the Commissioner. Glass v. Shalala, 43 F.3d 1392, 1395 (10th Cir. 1994). The Court will, however, meticulously examine the entire record to determine if the

Step One requires the claimant to establish that he is not engaged in substantial gainful activity (as defined at 20 C.F.R. §§ 404.1510 and 404.1572). Step Two requires that the claimant demonstrate that he has a medically severe impairment or combination of impairments that significantly limit his ability to do basic work activities. See 20 C.F.R. § 1521. If claimant is engaged in substantial gainful activity (Step One) or if claimant's impairment is not medically severe (Step Two), disability benefits are denied. At Step Three, claimant's impairment is compared with those impairments listed at 20 C.F.R. Pt. 404, Subpt. P, App. 1 (the "Listings"). If a claimant's impairment is equal or medically equivalent to an impairment in the Listings, claimant is presumed disabled. If a Listing is not met, the evaluation proceeds to Step Four, where the claimant must establish that his impairment or the combination of impairments prevents him from performing his past relevant work. A claimant is not disabled if the claimant can perform his past work. If a claimant is unable to perform his previous work, the Cornmissioner has the burden of proof (Step Five) to establish that the claimant, in light of his age, education, and work history, has the residual functional capacity ("RFC") to perform an alternative work activity in the national economy. If a claimant has the RFC to perform an alternate work activity, disability benefits are denied. See Bowen v. Yuckert, 482 U.S. 137, 140-42 (1987); Williams v. Bowen, 844 F.2d 748, 750-51 (10th Cir. 1988).

Commissioner's determination is rational. <u>Williams</u>, 844 F.2d at 750; <u>Holloway v.</u> <u>Heckler</u>, 607 F. Supp. 71, 72 (D. Kan. 1985).

"The finding of the Secretary^{4/} as to any fact, if supported by substantial evidence, shall be conclusive." 42 U.S.C. § 405(g). Substantial evidence is that amount and type of evidence that a reasonable mind will accept as adequate to support a conclusion. Richardson v. Perales, 402 U.S. 389, 401 (1971); Williams, 844 F.2d at 750. In terms of traditional burdens of proof, substantial evidence is more than a scintilla, but less than a preponderance. Perales, 402 U.S. at 401. Evidence is not substantial if it is overwhelmed by other evidence in the record. Williams, 844 F.2d at 750.

This Court must also determine whether the Commissioner applied the correct legal standards. Washington v. Shalala, 37 F.3d 1437, 1439 (10th Cir. 1994). The Commissioner's decision will be reversed when he uses the wrong legal standard or fails to clearly demonstrate reliance on the correct legal standards. Glass, 43 F.3d at 1395.

III. THE ALJ'S DECISION

The ALJ concluded that Plaintiff could perform a full range of medium work and was therefore not disabled at Step Four because Plaintiff could return to her prior past

Effective March 31, 1995, the functions of the Secretary of Health and Human Services ("Secretary") in social security cases were transferred to the Commissioner of Social Security. P.L. No. 103-296. For the purpose of this Order, references in case law to "the Secretary" are interchangeable with "the Commissioner."

relevant work. The ALJ additionally noted that even if he proceeded to Step Five, Plaintiff was not disabled pursuant to the Grids.

IV. REVIEW

PLAINTIFF'S RFC

Plaintiff asserts that the ALJ's findings with regard to her RFC are conclusory. Plaintiff notes that the ALJ found that she could perform a full range of medium work activity, but states that the ALJ provided no rationale to support his determination and made no references to the record. The Court cannot agree with Plaintiff's characterization of the ALJ's decision. The ALJ noted that Plaintiff was seen by Dr. Adelizzi for complaints of arthralgia, and was diagnosed with systemic lupus. [R. at 16]. Plaintiff had been treated by Dr. Uy for respiratory infections which presented no complications, and Plaintiff complained of nonspecific arthralgias. [R. at 16]. Dr. Uy noted Plaintiff's ranges of motion of all joints were within normal limits. [R. at 16]. The ALJ observed that on May 31, 1996, Dr. Uy wrote that Plaintiff had lupus with mild to moderate flare-ups requiring short courses of steroids for which she responds well. [R. at 16]. The ALJ noted that Plaintiff complained of severe and disabling pain and fatigue. The ALJ wrote that Plaintiff helps with her children in the morning, that she shopped until the last months of her pregnancy, that she does ceramics and attends church several times each week. [R. at 18]. The ALJ noted Plaintiff testified that she could sit 45 minutes to one hour, stand 30 to 45 minutes, and walk 45 minutes. [R. at 18]. The ALJ noted that Plaintiff testified she used a

walker, but observed that Plaintiff did not use the walker at the hearing and did not require assistance although Plaintiff had delivered a baby one week before the hearing. [R. at 18]. The ALJ noted Plaintiff's testimony that her pain was generally an eight, and was an eight at the time of her hearing, but that Plaintiff did not appear to be in any degree of discomfort. [R. at 18-19]. In addition, the record contains RFC assessments from two doctors indicating that Plaintiff can perform medium level work. The assessments note Plaintiff's diagnoses of lupus and Hepatitis A, but indicate that Plaintiff is predominantly asymptomatic. The ALJ additionally noted that a finding that an individual can do medium work also means that the person can perform sedentary and light work. [R. at 17, n.1]. The ALJ found that none of Plaintiff's doctors indicated restrictions beyond medium work.

Plaintiff additionally claims that the RFC finding is "inconsistent with all of the medical evidence." Plaintiff's Brief at 3. As reflected by some of the medical evidence in the record that is summarized above, this statement is untrue. The record contains an RFC signed by two doctors which indicates that Plaintiff can perform medium work. The record suggests that Plaintiff's lupus is generally asymptomatic and usually her flare-ups are controlled through steroids and antibiotics. Plaintiff's claim that the RFC is inconsistent with "all" of the medical evidence in the record is incorrect.

Plaintiff additionally states that she uses a cane for ambulation, and that the ALJ ignored this evidence. The ALJ noted Plaintiff's testimony, but additionally observed that Plaintiff did not need assistance of any kind in walking at the hearing

which was one week after Plaintiff had a baby. In addition, Plaintiff's treating physician indicated that Plaintiff's gait was fine although the treating physician believed Plaintiff's statement to him that she did use a cane in the morning.

Plaintiff also notes that Plaintiff's treating physician wrote that although Plaintiff did not use a cane during the examination, the treating physician believed that Plaintiff did use a cane. Plaintiff's treating physician reported her gait as normal. [R. at 135].

Plaintiff concludes by asserting that "nothing in the medical evidence supports a finding that Ms. Willing can perform medium work." Plaintiff's Brief at 4. Again, the record does contain RFC assessments by two doctors indicating that Plaintiff can perform medium work. [R. at 80]. Furthermore, as indicated in the ALJ's decision, a finding by the Commissioner that a claimant can perform medium work includes a conclusion that the Plaintiff can perform sedentary and light work. [R. at 17, n.1]. Plaintiff does not challenge the alternative findings with regard to her RFC.^{5/}

PRT FORM AND SUBSTANTIAL EVIDENCE

Plaintiff cites to <u>Cruse v. United States Department of Health and Human Services</u>, 49 F.3d 614 (10th Cir. 1995) for Plaintiff's contention that the record must support the conclusions reached by the ALJ in the PRT Form. Plaintiff is certainly

Medium work requires "lifting no more than 50 pounds at a time with frequent lifting or carrying of objects weighing up to 25 pounds. If someone can do medium work, we determine that he or she can also do sedentary and light work." 20 C.F.R. § 404.1567(c).

correct that the record must support the ALJ's conclusions and that the ALJ must discuss the evidence he considered in his opinion in reaching those conclusions.

Plaintiff refers to her testimony at the hearing before the ALJ. Plaintiff testified that she saw a counselor when she lived in New Jersey, and that she visits with her minister. Medical records from the University of Oklahoma Health Sciences indicate "Diagnosis/Assessment: (1) SLE (2) Depression." [R. at 143]. Plaintiff does not complain that the record contains insufficient information with regard to her mental condition, and does not assert that the ALJ erred by not fully developing the record. Plaintiff asserts, instead, that the ALJ provided "no rationale" for his conclusion that Plaintiff's asserted depression did not impose any additional restrictions on her. Plaintiff argues, "Other than his reference to the absence of treatment or medication the ALJ provided absolutely no rationale for his findings as to Ms. Willing's mental impairments."6/ Plaintiff's Brief at 4-5. Of course Plaintiff notes two reasons for the ALJ's decision with regard to Plaintiff's asserted mental impairment in her argument: Plaintiff has never been prescribed any medication for her asserted depression, and has never been referred for treatment. Plaintiff does not assert why these professed reasons are insufficient to support the ALJ's conclusions.

Specifically, the ALJ noted that one medical record form indicated a diagnosis of "depression," but that no treatment was recommended, and no medications were

^{6/} Plaintiff may be attempting to argue that the ALJ is required to discuss each of the four categories on the PRT Form and specifically note evidence that supports the ALJ's decision with regard to each of those categories. The Court does not read <u>Cruse</u> as imposing such a requirement.

prescribed. The ALJ additionally, in discussing Plaintiff's activities of daily living and in summarizing her testimony indicated that Plaintiff socialized, was involved in T-ball, did ceramics, and attended church and prayer groups. The Court concludes that the ALJ's decision does state reasons to support his conclusion that Plaintiff's asserted depression imposed no additional limitations upon Plaintiff's RFC.

STEP FOUR ANALYSIS

Plaintiff asserts that the ALJ erred in his Step Four analysis. Plaintiff refers to the three phases of the Step Four analysis and states that Plaintiff did not comply with the required Step Four steps. However, assuming Plaintiff is correct, and the ALJ did not make appropriate findings at Step Four, Plaintiff does not explain why this Court cannot affirm the ALJ's alternative findings at Step Five. The ALJ finds that, pursuant to the Grids, other work exists which Plaintiff can perform. The ALJ wrote:

This alternative finding that there is other work that the claimant could perform, even if she could not return to her past relevant work as a nurses aide, is made in the interest of judicial efficiency and is made upon the consideration of the shifting burden of proof at step 5 of the sequential evaluation process identified above. Under applicable regulations, the burden shifts to the Commissioner of the Social Security Administration at step 5 to show that there are other jobs existing in the regional or national economy that the claimant could perform, consistent with her

The ALJ's opinion is, at this point, not a model of clarity. The ALJ makes one reference to a vocational expert. However, no vocational expert testified at the hearing. The remainder of the ALJ's comments clearly refer to the Grids, and the Court interprets the brief reference to the vocational expert as a typographical error. Interpreting the reference in any other way makes no sense.

medically determinable impairments, functional limitations, and the foregoing vocational factors.

The claimant is a "younger individual," has a limited, 10th grade, education, and in view of her residual functional capacity, the issue of transferability of work skills is not material. Considering the claimant's residual functional capacity and her age, education, and work experience, Rules 203.25, 203.26, and 203.27 of Table No. 3, to Appendix 2, Subpart P, Regulations No. 4, a finding of not disabled would be appropriate.

The Medical-Vocational Guidelines of Appendix 2 to Subpart P, Regulations No. 4 provide a basis for determining the claimant's capacity for other work in view of her age, education, relevant work experience, and established residual functional capacity. Administrative Law Judge is authorized by 20 CFR 416.966 to take Administrative notice that a significant number of medium jobs exist in the region in which the claimant resides. Appendix 2 to 20 CFR 404.1500 specifies that approximately 2,500 separate sedentary, light and medium unskilled occupations can be identified in eight broad occupational categories, each occupation representing numerous obs in the national economy. These jobs can be performed after a short demonstration or within 30 days, and do not require special skills or experience.

[R. at 21-22]. The ALJ therefore concluded, at Step Five, that Plaintiff could perform a full range of medium work and was therefore not disabled based on the Grids. In addition, the ALJ noted that because Plaintiff could perform a full range of medium work she could also perform a full range of sedentary and light work. Based on the application of the Grids, Plaintiff was not disabled at either the sedentary, light, or medium levels.⁸/

Again, the ALJ does not do a good job of clearly delineating these separate conclusions. The regulations are clear, however, that an individual who can perform medium work is also presumed to be able

Plaintiff makes several general statements about the ALJ's Step Five analysis, but does not explain why the Grids are not substantial evidence of the ALJ's findings that Plaintiff is not disabled, and does not address the fact that since Plaintiff can perform medium work she is presumptively considered able to perform both sedentary and light work. Plaintiff notes only that "the ALJ's alternative step five finding did not cure the defect in his step four analysis because of the shift in the burden at step five." Plaintiff does not explain this argument. The ALJ based his Step Five analysis on the Grids. If an individual can perform a full range of activity within a given category, the Grids are adequate evidence that a significant number of jobs exist in the national economy.

Plaintiff states, "as noted, the ALJ's findings as to the RFC were conclusory, they were without the support of substantial evidence, and the findings do not satisfy the Commissioner's step five burden with respect to thee RFC." Plaintiff's RFC arguments were discussed and rejected above. Furthermore, Plaintiff deals only with the ALJ's findings that Plaintiff can perform a medium level of work activity. Plaintiff never addresses the fact that the finding that Plaintiff can perform medium work also means that Plaintiff can perform sedentary and light work. Finally, Plaintiff gives no

to perform sedentary and light work. Based on the restrictions found by this ALJ, application of the Grids would lead to a finding that Plaintiff is not disabled at either the sedentary, light, or medium exertional levels. The Court additionally notes that a remand simply to permit the ALJ to apply the Grids at the sedentary or light levels would be pointless. If in individual fits the Grid categories, the Grids are considered proof that a significant number of jobs exist in the national economy which that individual can perform, and the individual is therefore not disabled.

explanation as to why reliance on the Grids cannot support the Commissioner's burden at Step Five. 9/

V. CONCLUSION

Accordingly, the Commissioner's decision is AFFIRMED.

Dated this 22day of May 2000.

Sam A. Joyner

United States Magistrate Judge

^{9/} Plaintiff devotes only two sentences to her argument. Plaintiff may be suggesting that the presence of non-exertional impairments would preclude reliance on the Grids. Plaintiff would be correct, in the abstract. However, in this case, the ALJ found that Plaintiff had no non-exertional impairments that imposed any additional restrictions upon her. The ALJ concluded that Plaintiff could perform a full range of medium work activity.

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IN THE UNITED STATES DISTRICT COURT NORTHERN DISTRICT OF OKLAHOMA

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MAY 2 2 2000 /

PATRICE SCHUMPERT,)	Phil Lombardi, Clerk U.S. DISTRICT COURT
Plaintiff,)	/
VS.) Case No. 99-C	CV-0774-E (M)
THRIFTY RENT-A-CAR SYSTEM, INC)))	
Defendant.))	ENTERED ON DOCKET
JOINT STIPULATION OF DISMISSAL		

COMES NOW counsel for Patrice Schumpert, and counsel for Thrifty Rent-A-Car

System, Inc., and hereby dismisses without prejudice, the above styled cause.

Nancy E. Vaughn, OBA #7092

J. Ronald Petrikin, OBA #9214

Conner & Winters

15 East Fifth Street, Suite 3700

Tulsa, Oklahoma 74103-4344

(918) 586-5711

(918) 586-8547 - fax

ATTORNEY FOR DEFENDANT

Respectfully submitted,

Jeff Nix, OBA # 6688

Petroleum Club Building

601 South Boulder, Ste. 610

Tulsa, Oklahoma 74119

(918) 587-3193

(918) 587-3491 - fax

ATTORNEY FOR PLAINTIFF

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED MAY 22 2000

Phil Lombardi, Clerk

GEORGE PRATT,)
Plaintiff,)
-VS-)) No.: CIV-00-197B
STATE FARM FIRE and CASUALTY COMPANY and STATE FARM GENERAL INSURANCE COMPANY,)
Defendants.) ENTERED ON DOCKET
	DATE MAY 22 2000

ORDER OF DISMISSAL WITHOUT PREJUDICE

The above matter comes on to be heard this Zoday of Lagy, 2000, upon the written stipulation of the parties for a dismissal of said action without prejudice, and the Court, having examined said stipulation, finds that said action should be dismissed without prejudice pursuant to said stipulation.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the Court that the Plaintiff's cause of action filed herein against the Defendant be, and the same is hereby, dismissed without prejudice.

U S DISTRICT HIDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA
MAY 2 2 2000

UNITED VAN LINES, INC.,

Phil Lombardi, Clerk
U.S. DISTRICT COURT

Plaintiff,

V.

Court No: 99-CV-1101-B(E)

NEIL DAVID & SUSAN DAVID,

Defendants.

DEFAULT JUDGMENT

MAY 2 2 2000

ENTERED ON DOCKET
MAY 2 2 2000

WHEREAS, it appears that Defendants herein are in default and that the Clerk of the United States District Court has previously searched the records and entered default of the Defendants. It appears on Plaintiff's counsel's affidavit that Defendants are indebted to Plaintiff in the sum of \$4,437.16. Default has been entered against Defendants for failure to appear and Defendants are neither infants, incompetents, or serving in the United States Military.

HOWAL STATES

JOSEPH OF THE UNITED STATES

DISTRICT COURT

g, 15.00

IN THE	UNITED	STATES	DISTRIC	T COURT
FOR THE N	ORTHE	RN DISTI	RICT OF	OKLAHOMA

UNITED STATES OF AMERICA,	MAY 19 2000
Plaintiff,	S. DISTRICT COSTA
VS.) CASE NO. 00CV0137H(E)
MICKEY A. RAMIREZ,)) ENTERED ON DOCKET
Defendant.) DATE MAY 2 2 2000

AGREED JUDGMENT AND ORDER OF PAYMENT

Plaintiff, the United States of America, having filed its Complaint herein, and the defendant, having consented to the making and entry of this Judgment without trial, hereby agree as follows:

- 1. This Court has jurisdiction over the subject matter of this litigation and over all parties thereto. The Complaint filed herein states a claim upon which relief can be granted.
- 2. The defendant hereby acknowledges and accepts service of the Complaint filed herein.
- 3. The defendant hereby agrees to the entry of Judgment in the principal sums of \$6,664.31 and \$1,035.44, plus accrued interest of \$6,998.17 and \$923.04, plus interest thereafter at the rates of 9.13% and 8% per annum until judgment, plus filing fees in the amount of \$150.00, plus interest thereafter at the legal rate <u>6.197</u> until paid, plus costs of this action, until paid in full.
- 4. In addition to the regular monthly payment, the defendant hereby agrees to the submission of this debt to the Department of Treasury for inclusion in the Treasury Offset Program. Under this program, any federal payment the defendant would normally receive may be offset and applied to this debt.

- 4. Plaintiff's consent to the entry of this Judgment and Order of Payment is based upon certain financial information which defendant has provided it and the defendant's express representation to Plaintiff that he is unable to presently pay the amount of indebtedness in full and the further representation of the defendant that Mickey A. Ramirez will well and truly honor and comply with the Order of Payment entered herein which provides terms and conditions for the defendant's payment of the Judgment, together with costs and accrued interest, in regular monthly installment payments, as follows:
- (a) Beginning on or before the 15th day of June, 2000, the defendant shall tender to the United States a check or money order payable to the U.S. Department of Justice, in the amount of \$80.00, and a like sum on or before the 15th day of each following month until the entire amount of the Judgment, together with the costs and accrued postjudgment interest, is paid in full.
- (b) The defendant shall mail each monthly installment payment to: United States Attorney, Financial Litigation Unit, 333 West 4th Street, Suite 3460, Tulsa, Oklahoma 74103-3809.
- (c) Each said payment made by defendant shall be applied in accordance with the U.S. Rules, i.e., first to the payment of costs, second to the payment of postjudgment interest (as provided by 28 U.S.C. § 1961) accrued to the date of the receipt of said payment, and the balance, if any, to the principal.
- (d) The defendant shall keep the United States currently informed in writing of any material change in his/her financial situation or ability to pay, and of any change in his/her

employment, place of residence or telephone number. Defendant shall provide such information to the United States Attorney at the address set forth above.

- (e) The defendant shall provide the United States with current, accurate evidence of his/her assets, income and expenditures (including, but not limited to his/her Federal income tax returns) within fifteen (15) days for the date of a request for such evidence by the United States Attorney.
- 5. Default under the terms of this Agreed Judgment will entitle the United States to execute on this Judgment without notice to the defendant.
- 6. The parties further agree that any Order of Payment which may be entered by the Court pursuant hereto may thereafter be modified and amended upon stipulation of the parties; or, should the parties fail to agree upon the terms of a new stipulated Order of Payment, the Court may, after examination of the defendant, enter a supplemental Order of Payment.
 - 7. The defendant has the right of prepayment of this debt without penalty.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff have and recover judgment against the Defendant, Mickey A. Ramirez, in the principal amounts of \$6,664.31 and \$1,035.44, plus accrued interest in the amounts of \$6,998.17 and \$923.04, plus interest at the rates of 9.13% and 8% until judgment, plus filing fees in the amount of \$150.00, plus interest

thereafter at the current legal rate of <u>10.197</u> percent per annum until paid, plus the costs of this action.

UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM:

Stephen C. Lewis United States Attorney

PHIL PINNELL, OBA #7169 Assistant United States Attorney

MICKEY A KAMIREZ

PEP/llf

5-25-00

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

MAY 3 0 2000

UNITED STATES OF AMERICA Plaintiff,) }	Phil Lombardi, Clerk U.S. DISTRICT COURT
V.	CIVIL NO. 9,5CVO	129K(E)
THOMAS J. MOUNT, Defendant.)) JUDGMENT	ENTERED ON DOCKET DATEMAY 2 2 2000

This matter came before the Court on Plaintiff's Motion for Summary Judgment. The Court duly considered the issues and rendered a decision in accordance with the order filed on <u>May 30</u>, 2000.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that judgment is hereby entered for Plaintiff and against Defendant in the principal amounts of \$4,441.79, \$2,529.05 and \$1,238.62, plus administrative charges in the amounts of \$31.78, \$17.68 and \$8.54, plus accrued interest in the amounts of \$2,475.82, \$1,175.97 and \$495.95 as of January 20, 2000, at the rates of 10.7%, 9.13 % and 8% per annum until judgment, filing fees in the amount of \$150.00, plus interest thereafter at the legal rate of 6.1972 until paid.

IT IS SO ORDERED.

This 26 day of //ky

, 2000

TERRY C. KERN

United States District Judge

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UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA Plaintiff,) DATE MAY 2/2 2000
v. THOMAS J. MOUNT, Defendant.	CIVIL NO. 98CV0129K(E) FILE D MAY 3 0 2000

ORDER GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

Phil Lombardi, Clerk U.S. DISTRICT COURT

This matter comes on for consideration this day of May, 2000 upon Plaintiff's Motion for Summary Judgment. The United States of America by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Phil Pinnell, Assistant United States Attorney, moves pursuant to Rule 56 of the Federal Rules of Civil Procedure, for Summary Judgment in its favor and against the defendant, Thomas J. Mount.

The Court being fully advised and having examined the court file, has determined that the Plaintiff is entitled to Judgment as a matter of law.

IT IS THEREFORE ORDERED, ADJUDGED, and DECREED that the Plaintiff have and recover judgment against the Defendant, Thomas J. Mount, for the principal amounts of \$4,441.79, \$2,529.05 and \$1,238.62, plus administrative charges in the amounts of \$31.78, \$17.68 and \$8.54, plus accrued interest in the amounts of \$2,475.82, \$1,175.97 and \$495.95, at the rates of 10.7%, 9.13% and 8% per annum until judgment, plus filing fees in the amount of \$150.00 as

provided by 28 U.S.C. § 2412(a)(2), plus interest thereafter at the legal rate of $\sqrt{a.197}$ until paid.

HONORABLE TERRY C. KERN UNITED STATES DISTRICT JUDGE

PEP/IIf

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UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,	ENTERED ON DOCKET
one in the or and the or	DATE MAY 2 2 2000
Plaintiff,	
v.) No. 00CV0057H(M)
VONDA E. HUNT,)
Defendant.	FILED
	MAY 1 9 2000 (

DEFAULT JUDGMENT

Phil Lombardi, Clerk U.S. DISTRICT COURT

The Court being fully advised and having examined the court file finds that Defendant, Vonda E. Hunt, was served with Summons and Complaint on March 10, 2000. The time within which the Defendant could have answered or otherwise moved as to the Complaint has expired and has not been extended. The Defendant has not answered or otherwise moved, and default has been entered by the Clerk of this Court. Plaintiff is entitled to Judgment as a matter of law.

IT IS THEREFORE ORDERED, ADJUDGED, and DECREED that the Plaintiff have and recover judgment against the Defendant, Vonda E. Hunt, for the principal amounts of \$3,472.45 and \$2,942.17, plus

accrued interest of \$2,674.89 and \$2,037.48, plus interest thereafter at the rates of 6.79% and 8% per annum until judgment, plus filing fees in the amount of \$150.00 as provided by 28 U.S.C. \$2412(a)(2), plus interest thereafter at the current legal rate of 6.197 percent per annum until paid, plus costs of this action.

nited States District Judge

Submitted By:

PHIL PINNELL, OBA # 7169

Assistant United States Attorney 333 West 4th Street, Suite 3460 Tulsa, Oklahoma 74103-3809

(918)581-7463

PEP/11f

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,	MAY 2 2 2000
Plaintiff,	}
v.) No. 99CV1050H(M)
DOROTHY A. PLETT,	\mathbf{FILED}
Defendant.	MAY 1 9 2000 C

Phil Lombardi, Clerk U.S. DISTRICT COURT

DEFAULT JUDGMENT

The Court gave due consideration to the pleadings and documents filed in support of the plaintiff's Complaint. The Court finds the plaintiff is entitled to judgment from its review of the supporting documentation.

The Court being fully advised and having examined the court file finds that Defendant, Dorothy A. Plett, was served with Summons and Complaint on February 9, 2000. The time within which the Defendant could have answered or otherwise moved as to the

Complaint has expired and has not been extended. The Defendant has not answered or otherwise moved, and default has been entered by the Clerk of this Court. Plaintiff is entitled to Judgment as a matter of law.

IT IS THEREFORE ORDERED, ADJUDGED, and DECREED that the Plaintiff have and recover judgment against the Defendant, Dorothy A. Plett, for the principal amount of \$3,286.55 and \$1,401.69, plus accrued interest of \$1,281.68 and \$559.30, plus interest thereafter at the rate of 8 percent per annum until judgment, plus filing fees in the amount of \$150.00 as provided by 28 U.S.C. § 2412(a)(2), plus interest thereafter at the current legal rate of 6.197 percent per annum until paid, plus costs of this action.

United States District Judge

Submitted By:

PHIL PINNELL, OBA # 7169

Assistant United States Attorney 333 West 4th Street, Suite 3460 Tulsa, Oklahoma 74103-3809

(918)581-7463

PEP/alh

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

MOHAMMED AMEEN,	Phil Lompardi, Clerk U.S. DISTRICT COURT
Plaintiff,	Case No. 99CV0741BU(J)
v.	ENTERED ON DOCKET
BRIDGESTONE/FIRESTONE, INC.,	DATE MAY \$ 2 2000
Defendant.	The state of the s

STIPULATION FOR DISMISSAL

Pursuant to Fed.R.Civ.P. 41(a)(1)(ii), the parties stipulate that this matter may be dismissed with prejudice to further litigation.

David W. Davis, OBA No. 015067

405 South Boulder

4th Floor

Tulsa, Oklahoma 74103

Telephone: 918/592/2007

Respectfully submitted,

John C. Niemeyer, OBA No. 6683

Harris A. Phillips, OBA No. 14134

Niemeyer, Alexander, Austin & Phillips

300 N. Walker

Oklahoma City, OK 73102

Telephone: 405/232-2725

Facsimile: 405/239-7185

ATTORNEYS FOR PLAINTIFF

ATTORNEYS FOR DEFENDANT

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FILED

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

MAY 2 2 2000

JAMES M. MORGAN, JR.,	Phil Lombardi, Cler U.S. DISTRICT COURT
Plaintiff,)
v.)) Case No. 99-CV-1023-M
UNITED STATES OF AMERICA,	ENTERED ON DOCKET
Defendan	t.) DATE

STIPULATION OF DISMISSAL WITH PREJUDICE

The Plaintiff, James M. Morgan, Jr. by his attorney of record, H. I. Aston, and the Defendant, United States of America, by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Cathryn McClanahan, Assistant United States Attorney, having fully settled all claims asserted by the Plaintiff in this litigation, hereby stipulate to, and request entry by the Court, of the Order submitted herewith dismissing all such claims with prejudice.

Dated this 22 day of may, 2000.

H. I. Aston

3242 E. 30th Pl.

Tulsa, OK 74114-5831

918.749.8523

Cathryn McClanahan, OBA #14853
Assistant United States Attorney

333 W. 4th St., Ste. 3460 Tulsa, OK 74103-3809

918.581.7463

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